THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

JUNE 23, 2017 and OCTOBER 12, 2017

IN THE

# Supreme Court of Nebraska

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NEBRASKA REPORTS

VOLUME CCXCVII

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PEGGY POLACEK

OFFICIAL REPORTER

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PUBLISHED BY
THE STATE OF NEBRASKA
LINCOLN
2024

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## SUPREME COURT
## DURING THE PERIOD OF THESE REPORTS

Michael G. Heavican, Chief Justice
John F. Wright, Associate Justice
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice
Max Kelch, Associate Justice
Jeffrey J. Funke, Associate Justice

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## COURT OF APPEALS
## DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
Everett O. Inbody, Associate Judge
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge
David K. Arterburn, Associate Judge

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Peggy Polacek . . . . . Reporter
Teresa A. Brown . . . . . Clerk
Corey Steel . . . . . State Court Administrator

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

**First District**

*Counties in District:* Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer

| *Judges in District* | *City* |
|---|---|
| Vicky L. Johnson | Wilber |
| Ricky A. Schreiner | Beatrice |
| Julie D. Smith | Tecumseh |

**Second District**

*Counties in District:* Cass, Otoe, and Sarpy

| *Judges in District* | *City* |
|---|---|
| William B. Zastera | Papillion |
| George A. Thompson | Papillion |
| Michael A. Smith | Plattsmouth |
| Stefanie A. Martinez | Papillion |

**Third District**

*Counties in District:* Lancaster

| *Judges in District* | *City* |
|---|---|
| John A. Colborn | Lincoln |
| Jodi Nelson | Lincoln |
| Robert R. Otte | Lincoln |
| Andrew R. Jacobsen | Lincoln |
| Lori A. Maret | Lincoln |
| Susan I. Strong | Lincoln |
| Darla S. Ideus | Lincoln |
| Kevin R. McManaman | Lincoln |

**Fourth District**

*Counties in District:* Douglas

| *Judges in District* | *City* |
|---|---|
| Gary B. Randall | Omaha |
| J. Michael Coffey | Omaha |
| W. Mark Ashford | Omaha |
| Peter C. Bataillon | Omaha |
| Gregory M. Schatz | Omaha |
| J Russell Derr | Omaha |
| James T. Gleason | Omaha |
| Thomas A. Otepka | Omaha |
| Marlon A. Polk | Omaha |
| W. Russell Bowie III | Omaha |
| Leigh Ann Retelsdorf | Omaha |
| Timothy P. Burns | Omaha |
| Duane C. Dougherty | Omaha |
| Kimberly Miller Pankonin | Omaha |
| Shelly R. Stratman | Omaha |
| Horacio J. Wheelock | Omaha |

**Fifth District**

*Counties in District:* Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

| *Judges in District* | *City* |
|---|---|
| Robert R. Steinke | Columbus |
| Mary C. Gilbride | Wahoo |
| James C. Stecker | Seward |
| Rachel A. Daugherty | Aurora |

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

**Sixth District**

*Counties in District:* Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

| *Judges in District* | *City* |
|---|---|
| John E. Samson | Blair |
| Geoffrey C. Hall | Fremont |
| Paul J. Vaughan | Dakota City |

**Seventh District**

*Counties in District:* Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

| *Judges in District* | *City* |
|---|---|
| James G. Kube | Madison |
| Mark A. Johnson | Madison |

**Eighth District**

*Counties in District:* Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

| *Judges in District* | *City* |
|---|---|
| Mark D. Kozisek | Ainsworth |
| Karin L. Noakes | St. Paul |

**Ninth District**

*Counties in District:* Buffalo and Hall

| *Judges in District* | *City* |
|---|---|
| Teresa K. Luther | Grand Island |
| William T. Wright | Kearney |
| Mark J. Young | Grand Island |
| John H. Marsh | Kearney |

**Tenth District**

*Counties in District:* Adams, Franklin, Harlan, Kearney, Phelps, and Webster

| *Judges in District* | *City* |
|---|---|
| Stephen R. Illingworth | Hastings |
| Terri S. Harder | Minden |

**Eleventh District**

*Counties in District:* Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

| *Judges in District* | *City* |
|---|---|
| Donald E. Rowlands | North Platte |
| James E. Doyle IV | Lexington |
| David Urbom | McCook |
| Richard A. Birch | North Platte |

**Twelfth District**

*Counties in District:* Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

| *Judges in District* | *City* |
|---|---|
| Leo Dobrovolny | Gering |
| Derek C. Weimer | Sidney |
| Travis P. O'Gorman | Alliance |

# JUDICIAL DISTRICTS AND COUNTY JUDGES

**First District**

*Counties in District:* Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer

| *Judges in District* | *City* |
|---|---|
| Curtis L. Maschman | Falls City |
| Steven B. Timm | Beatrice |
| Linda A. Bauer | Fairbury |

**Second District**

*Counties in District:* Cass, Otoe, and Sarpy

| *Judges in District* | *City* |
|---|---|
| Robert C. Wester | Papillion |
| John F. Steinheider | Nebraska City |
| Todd J. Hutton | Papillion |
| PaTricia A. Freeman | Papillion |

**Third District**

*Counties in District:* Lancaster

| *Judges in District* | *City* |
|---|---|
| Laurie Yardley | Lincoln |
| Timothy C. Phillips | Lincoln |
| Matthew L. Acton | Lincoln |
| Holly J. Parsley | Lincoln |
| Thomas E. Zimmerman | Lincoln |
| Rodney D. Reuter | Lincoln |
| John R. Freudenberg | Lincoln |

**Fourth District**

*Counties in District:* Douglas

| *Judges in District* | *City* |
|---|---|
| Lawrence E. Barrett | Omaha |
| Marcena M. Hendrix | Omaha |
| Darryl R. Lowe | Omaha |
| John E. Huber | Omaha |
| Jeffrey Marcuzzo | Omaha |
| Craig Q. McDermott | Omaha |
| Marcela A. Keim | Omaha |
| Sheryl L. Lohaus | Omaha |
| Thomas K. Harmon | Omaha |
| Derek R. Vaughn | Omaha |
| Stephanie R. Hansen | Omaha |
| Stephanie F. Shearer | Omaha |

**Fifth District**

*Counties in District:* Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

| *Judges in District* | *City* |
|---|---|
| Frank J. Skorupa | Columbus |
| Patrick R. McDermott | David City |
| Linda S. Caster Senff | Aurora |
| C. Jo Petersen | Seward |
| Stephen R.W. Twiss | Central City |

# JUDICIAL DISTRICTS AND COUNTY JUDGES

**Sixth District**

*Counties in District:* Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

| *Judges in District* | *City* |
|---|---|
| C. Matthew Samuelson | Blair |
| Kurt Rager | Dakota City |
| Douglas L. Luebe | Hartington |
| Kenneth Vampola | Fremont |

**Seventh District**

*Counties in District:* Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

| *Judges in District* | *City* |
|---|---|
| Donna F. Taylor | Madison |
| Ross A. Stoffer | Pierce |
| Michael L. Long | Madison |

**Eighth District**

*Counties in District:* Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

| *Judges in District* | *City* |
|---|---|
| James J. Orr | Valentine |
| Tami K. Schendt | Broken Bow |
| Kale B. Burdick | O'Neill |

**Ninth District**

*Counties in District:* Buffalo and Hall

| *Judges in District* | *City* |
|---|---|
| Gerald R. Jorgensen, Jr. | Kearney |
| Arthur S. Wetzel | Grand Island |
| John P. Rademacher | Kearney |
| Alfred E. Corey III | Grand Island |

**Tenth District**

*Counties in District:* Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster

| *Judges in District* | *City* |
|---|---|
| Michael P. Burns | Hastings |
| Timothy E. Hoeft | Holdrege |
| Michael O. Mead | Hastings |

**Eleventh District**

*Counties in District:* Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

| *Judges in District* | *City* |
|---|---|
| Kent D. Turnbull | North Platte |
| Edward D. Steenburg | Ogallala |
| Anne Paine | McCook |
| Michael E. Piccolo | North Platte |
| Jeffrey M. Wightman | Lexington |

**Twelfth District**

*Counties in District:* Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

| *Judges in District* | *City* |
|---|---|
| James M. Worden | Gering |
| Randin Roland | Sidney |
| Russell W. Harford | Chadron |
| Kristen D. Mickey | Gering |
| Paul G. Wess | Alliance |

## SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

Douglas County

| *Judges* | *City* |
|---|---|
| Douglas F. Johnson | Omaha |
| Elizabeth Crnkovich | Omaha |
| Wadie Thomas | Omaha |
| Christopher Kelly | Omaha |
| Vernon Daniels | Omaha |
| Matthew R. Kahler | Omaha |

Lancaster County

| *Judges* | *City* |
|---|---|
| Toni G. Thorson | Lincoln |
| Linda S. Porter | Lincoln |
| Roger J. Heideman | Lincoln |
| Reggie L. Ryder | Lincoln |

Sarpy County

| *Judges* | *City* |
|---|---|
| Lawrence D. Gendler | Papillion |
| Robert B. O'Neal | Papillion |

## WORKERS' COMPENSATION COURT AND JUDGES

| *Judges* | *City* |
|---|---|
| James R. Coe | Omaha |
| J. Michael Fitzgerald | Lincoln |
| John R. Hoffert | Lincoln |
| Thomas E. Stine | Omaha |
| Daniel R. Fridrich | Omaha |
| Julie A. Martin | Lincoln |
| Dirk V. Block | Lincoln |

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McKynze Perry Works
Debra Lee Wray
Ellen Jane Wynegar
Coleman James Younger
Ryan Michael Zajic
Alex Michael Zimmer

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# LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

# LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-16-803: **State ex rel. Counsel for Dis. v. Garrison**. Monitoring plan approved, and application for reinstatement granted.

No. S-16-1135: **State v. McCain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-17-247: **State v. Loyd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-17-279: **Palma-Solano v. Frakes**. Appeal dismissed for failure to file briefs.

No. S-17-330: **State v. Pavey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-17-458: **State v. Garcia**. Appeal dismissed. See § 2-107(A)(2).

# LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-15-777: **Jones v. McDonald Farms**, 24 Neb. App. 649 (2017). Petition of appellant for further review denied on June 26, 2017.

No. A-15-899: **Anthony v. Cattle Nat. Bank & Trust Co**. Petition of appellant for further review denied on June 20, 2017.

Nos. A-15-900, A-16-003: **Cattle Nat. Bank & Trust Co. v. Anthony**. Petitions of appellant for further review denied on June 20, 2017.

No. A-15-923: **State v. Purdy**. Petition of appellant for further review denied on September 8, 2017.

No. A-15-1039: **State v. Cook**. Petition of appellant for further review denied on July 10, 2017.

No. A-15-1112: **Parking Mgmt. & Consultants v. City of Omaha**. Petition of appellant for further review denied on July 20, 2017.

No. A-15-1143: **Hovey v. Hovey**. Petition of appellee for further review denied on July 12, 2017.

No. A-16-033: **Kountze v. Domina Law Group**. Petition of appellant for further review denied on August 4, 2017.

No. S-16-054: **Becher v. Becher**, 24 Neb. App. 726 (2017). Petition of appellant for further review sustained on September 27, 2017.

No. S-16-054: **Becher v. Becher**, 24 Neb. App. 726 (2017). Petition of appellee for further review sustained on September 27, 2017.

No. S-16-113: **Nadeem v. State**, 24 Neb. App. 825 (2017). Petition of appellee for further review sustained on August 17, 2017.

No. A-16-121: **Bilderback-Vess v. Vess**. Petition of appellant for further review denied on June 29, 2017.

No. A-16-126: **Latenser v. Omaha Zoning Board of Appeals**. Petition of appellant for further review denied on August 4, 2017.

No. S-16-127: **Komar v. State**, 24 Neb. App. 692 (2017). Petition of appellant for further review sustained on August 4, 2017.

No. A-16-208: **Andrew v. Village of Nemaha**. Petition of appellant for further review denied on September 14, 2017.

No. A-16-248: **Lewis v. Lewis**. Petition of appellant for further review denied on June 20, 2017.

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No. A-16-249: **Aschoff v. State**. Petition of appellants for further review denied on July 10, 2017.

No. A-16-250: **Arndt v. Arndt**. Petition of appellant for further review denied on July 31, 2017.

No. A-16-272: **Domina Law Group v. Kountze**. Petition of appellant for further review denied on August 4, 2017.

No. A-16-309: **Northeast Neb. Pub. Power Dist. v. Nebraska Pub. Power Dist.**, 24 Neb. App. 837 (2017). Petition of appellant for further review denied on September 13, 2017.

No. A-16-459: **Panhandle Collections v. Jacobson**. Petition of appellant for further review denied on June 26, 2017.

No. A-16-460: **Computer Support Servs. v. Vaccination Servs**. Petition of appellant for further review denied on August 30, 2017.

No. A-16-507: **In re Interest of Gabriella N. et al**. Petition of appellant for further review denied on October 2, 2017.

No. A-16-531: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellant for further review denied on July 20, 2017.

No. A-16-531: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellee for further review denied on July 20, 2017.

No. A-16-576: **Castonguay v. Stieren**. Petition of appellant for further review denied on August 7, 2017.

No. A-16-620: **Ganzel v. Ganzel**. Petition of appellant for further review denied on August 30, 2017.

No. A-16-631: **State v. Bowman**. Petition of appellant for further review denied on June 26, 2017.

No. A-16-662: **State v. Delgado**. Petition of appellant for further review denied on July 20, 2017.

No. A-16-671: **State v. Hollins**. Petition of appellant for further review denied on July 20, 2017.

No. A-16-684: **In re Interest of K.W.**, 24 Neb. App. 619 (2017). Petition of appellant for further review denied on June 26, 2017.

No. A-16-747: **Davlin v. Cruickshank**. Petition of appellant for further review denied on October 4, 2017.

No. A-16-759: **In re Interest of Phoenix W. et al**. Petition of appellant for further review denied on July 6, 2017.

No. A-16-825: **State v. Rios**. Petition of appellant for further review denied on August 4, 2017.

No. A-16-850: **Miller v. Miller**. Petition of appellant for further review denied on August 14, 2017.

No. A-16-853: **State v. Ross**. Petition of appellant for further review denied on June 28, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-16-882: **State v. Hobdell**. Petition of appellant for further review denied on July 6, 2017.

No. A-16-905: **Carey v. Hand**. Petition of appellee for further review denied on August 30, 2017.

No. A-16-937: **Finke v. Employer Solutions Staffing**. Petition of appellant for further review denied on July 19, 2017.

No. A-16-947: **In re Interest of Austin G.**, 24 Neb. App. 773 (2017). Petition of appellant for further review denied on August 7, 2017.

No. A-16-949: **Assad v. Sidney Regional Med. Ctr**. Petition of appellant for further review denied on July 12, 2017.

No. A-16-972: **Kirkelie v. Henry**. Petition of appellant for further review denied on October 4, 2017.

No. A-16-1018: **Leslie v. City of Sidney**. Petition of appellant for further review denied on September 5, 2017.

No. A-16-1045: **Krenk v. Franks**. Petition of appellant for further review denied on August 2, 2017.

No. A-16-1102: **State v. Ruegge**. Petition of appellant pro se for further review denied on August 7, 2017.

Nos. A-16-1216, A-16-1217: **State v. Guel**. Petitions of appellant for further review denied on June 19, 2017.

No. A-17-013: **State v. Alcala**. Petition of appellant pro se for further review denied on June 26, 2017.

No. A-17-014: **State v. King**. Petition of appellant for further review denied on June 28, 2017.

No. A-17-024: **State v. Jennings**. Petition of appellee for further review denied on September 6, 2017.

No. A-17-029: **Davlin v. Cruickshank**. Petition of appellant for further review denied on September 13, 2017.

No. A-17-059: **State v. Jones**. Petition of appellant for further review denied on September 14, 2017.

No. A-17-068: **State v. Sands**. Petition of appellant for further review denied on August 31, 2017.

No. A-17-090: **State v. Peery**. Petition of appellant for further review denied on September 14, 2017.

No. A-17-137: **Reising v. Department of Corrections**. Petition of appellant for further review denied on August 4, 2017, as untimely filed.

No. A-17-164: **State v. Allee**. Petition of appellant for further review denied on July 26, 2017, as premature.

No. A-17-172: **Fitzgerald v. Cruickshank**. Petition of appellant for further review denied on July 20, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-17-175: **State v. Bishop**. Petition of appellant for further review denied on June 26, 2017.

No. A-17-209: **Harvey v. Harvey**. Petition of appellant for further review denied on June 19, 2017, as untimely.

No. A-17-209: **Harvey v. Harvey**. Petition of appellant for further review denied on June 30, 2017.

No. A-17-215: **State v. Hansher**. Petition of appellant for further review denied on July 31, 2017.

No. A-17-234: **Mehner Family Trust v. U.S. Bank**. Petition of appellant for further review denied on October 2, 2017.

No. A-17-285: **State v. Hollingsworth**. Petition of appellant for further review denied on September 14, 2017.

No. A-17-300: **State v. Gaines**. Petition of appellant for further review denied on September 27, 2017.

No. A-17-307: **Patmon v. State**. Petition of appellant for further review denied on October 4, 2017.

No. A-17-358: **State v. Shere**. Petition of appellant for further review denied on June 20, 2017.

No. A-17-358: **State v. Shere**. Petition of appellant for further review denied on August 2, 2017, for lack of jurisdiction.

No. A-17-399: **Campbell v. Hansen**. Petition of appellant for further review denied on July 26, 2017, as premature.

No. S-17-399: **Campbell v. Hansen**. Petition of appellant for further review sustained on August 30, 2017.

No. A-17-523: **Jackson v. Henry**. Petition of appellant for further review denied on August 23, 2017.

No. A-17-679: **Castonguay v. Castonguay**. Petition of appellant for further review denied on October 2, 2017.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Angela Rodriguez and Adan Rodriguez, Special Administrators of the Estate of Melissa Rodriguez, appellants, v. Catholic Health Initiatives, doing business as CHI Health, et al., appellees.

899 N.W.2d 227

Filed June 23, 2017. No. S-15-1205.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Pleadings: Appeal and Error.** An appellate court reviews a district court's denial of a motion for leave to amend a complaint for an abuse of discretion. However, an appellate court reviews de novo an underlying legal conclusion that the proposed amendments would be futile.
3. **Motions to Dismiss: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusions.
4. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
5. **Actions: Pleadings: Notice.** Civil actions are controlled by a liberal pleading regime; a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
6. **Actions: Pleadings.** The rationale for a liberal notice pleading standard in civil actions is that when a party has a valid claim, he or she should

recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage.

7. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
8. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
9. ____. The existence of a duty generally serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances.
10. ____. Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.
11. ____. Whether a duty exists is a policy decision.
12. **Negligence: Mental Health.** Under Neb. Rev. Stat. § 38-2137(2) (Reissue 2016), the duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under the limited circumstances specified in § 38-2137(1), and shall be discharged by the mental health practitioner if reasonable efforts are made to communicate the threat to the victim or victims and to a law enforcement agency.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Reversed and remanded for further proceedings.

Brian E. Jorde, of Domina Law Group, P.C., L.L.O., for appellants.

Patrick G. Vipond, William R. Settles, and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., for appellees Catholic Health Initiatives, doing business as CHI Health, et al.

J. Scott Paul and Jay D. Koehn, of McGrath, North, Mullin & Kratz, P.C., L.L.O., and, on brief, Elizabeth Bruening Smith, for appellee The Noll Company.

Joseph S. Daly and Mary M. Schott, of Sodoro, Daly, Shomaker & Selde, P.C., L.L.O., for appellees UNMC Physicians and Jane Doe Physician #1.

Heavican, C.J., Miller-Lerman, Stacy, and Kelch, JJ., and Bishop, Judge.

Miller-Lerman, J.

NATURE OF CASE

After Melissa Rodriguez was killed by Mikael Loyd, Melissa's parents, Angela Rodriguez and Adan Rodriguez, as the special administrators of Melissa's estate (collectively the appellants), brought this negligence and wrongful death action in the district court for Douglas County. The appellants filed their second amended complaint against numerous defendants whom we treat as three groups. The first group is collectively referred to as the "Lasting Hope defendants," composed of Catholic Health Initiatives, doing business as CHI Health; Alegent Creighton Health, now known as CHI Health Alegent Creighton Clinic; Lasting Hope Recovery Center of Catholic Health Initiatives (Lasting Hope); "John Doe #1," an employee of Lasting Hope; "John Doe #2," an employee of Lasting Hope; three Noll entities (Noll Human Resource Services, The Noll Company, and Noll, Inc.); and "Jane Doe Nurse #1," an employee of a Noll entity. The second group is collectively referred to as the "UNMC defendants," composed of UNMC Physicians (UNMC) and "Jane Doe Physician #1," an employee of UNMC. The third group is collectively referred to as the "City defendants" composed of the City of Omaha, "Officer Doe #1," and "Officer Doe #2." The appellants claimed that the defendants were negligent in various respects and specifically in failing to protect Melissa from Loyd. All the defendants moved to dismiss the second amended complaint. The district court granted the defendants' motions to dismiss. The district court denied the appellants' leave to amend their second amended complaint except as to the City defendants. The appellants did not amend their allegations regarding the City defendants, and the City defendants stood dismissed. The appellants filed this appeal challenging the dismissal of the Lasting Hope defendants and UNMC

defendants. The City defendants are not parties to this appeal. We determine that the district court erred when it dismissed the appellants' second amended complaint as to the Lasting Hope defendants. We further conclude that the district court erred when it denied the appellants' motion to amend the second amended complaint to add allegations relative to the UNMC defendants and dismissed the UNMC defendants. We reverse, and remand for further proceedings.

## STATEMENT OF FACTS

According to the appellants' second amended complaint, which is the operative pleading in this case, on or about June 11, 2013, Loyd assaulted and battered Melissa. The Omaha Police Department (OPD) was contacted regarding the incident, and officers completed a domestic violence report. Charges were not brought against Loyd at that time, but an investigation was ongoing. The second amended complaint alleges that in July, Loyd falsely imprisoned Melissa for a period of time. Melissa contacted the OPD regarding Loyd at various times in July and August.

On August 7, 2013, the OPD issued an arrest warrant for Loyd for the misdemeanor assault and battery of Melissa. On August 8, Loyd contacted the OPD and voluntarily met with and spoke to officers. During this meeting, "Loyd expressed a desire to kill." The OPD then placed Loyd under emergency protective custody because it believed that Loyd was "mentally ill and an imminent threat of danger to himself or others." Loyd was transferred to Lasting Hope. The appellants allege that at the time Loyd was placed under emergency protective custody, Lasting Hope was "aware of his misdemeanor warrant." The second amended complaint further states: "Lasting Hope knew or should have known that the [emergency protective custody] hold placed on Loyd was the result of Loyd threatening to kill his mother and professing he was a danger to himself and others."

Loyd remained at Lasting Hope from August 8 to 14, 2013. Pursuant to Neb. Rev. Stat. § 71-919 (Reissue 2009), within 36 hours of being admitted to a mental health facility, an individual under emergency protective custody must undergo a mental health evaluation to be performed by a mental health professional. Section 71-919(4) provides that "[a] person shall be released from emergency protective custody after completion of such evaluation unless the mental health professional determines, in his or her clinical opinion, that such person is mentally ill and dangerous or a dangerous sex offender." On August 11, Jane Doe Physician #1, an employee of UNMC, prepared a mental health evaluation of Loyd and found "Loyd not to be a danger to himself or others."

According to the second amended complaint, while Loyd was at Lasting Hope, he made repeated calls to Melissa from Lasting Hope's landline telephone. Loyd called Melissa on August 8, at least 6 times on August 10, and 18 times on August 11.

On August 12, 2013, Loyd called the OPD to effectively turn himself in on the outstanding arrest warrant. OPD officers went to Lasting Hope to arrest Loyd, but Lasting Hope refused to release Loyd to the officers because the emergency protective custody hold was still in effect. The second amended complaint states that "[i]t is believed Jane Doe Nurse #1, employed by Noll, was responsible for the discharge of Loyd and involved in the failure to properly review the circumstances of Loyd's admission and communicate effectively to the OPD that Lasting Hope planned to release Loyd."

According to the second amended complaint, on August 14, 2013, "Loyd left Lasting Hope on his own, without supervision, being questioned or stopped, and without Lasting Hope even noticing he was gone. Loyd freely walked out the facility sometime between 12:49 p.m. and 2:22 p.m." Lasting Hope did not notify the OPD on August 14 that Loyd had left its premises. Sometime after 4:15 p.m. on August 14, Loyd killed Melissa and later returned to Lasting Hope at

approximately 8 p.m. Subsequently, on August 16, while he was still at Lasting Hope, Loyd was arrested for the murder of Melissa.

The second amended complaint notes that in September 2013, Loyd was found not competent to stand trial, and that in January 2014, Loyd was diagnosed as paranoid schizophrenic.

The appellants filed their second amended complaint on July 17, 2015. They claimed that the defendants were negligent in part for failing to provide Loyd with adequate mental health treatment and for failing to protect Melissa from Loyd. All the defendants filed motions to dismiss for failure to state a claim upon which relief can be granted. The defendants also filed motions to stay discovery. On July 31, the district court filed an order in which it granted the defendants' motions to stay discovery until it had had an opportunity to rule on the pending motions to dismiss.

After a hearing, on October 16, 2015, the district court filed an order in which it granted all of the defendants' motions to dismiss. The district court stated that the only issue raised by the motions to dismiss was whether any of the defendants owed a duty. The district court quoted *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006):

> "a psychiatrist is liable for failing to warn of and protect from a patient's threatened violent behavior, or failing to predict and [warn of and] protect from a patient's violent behavior, when the patient has communicated to the psychiatrist a serious threat of physical violence against himself, herself, or a reasonably identified victim or victims. The duty to warn of or to take reasonable precautions to provide protection from violent behavior shall arise only under those limited circumstances . . . ."

The district court determined that the duty required of psychologists, psychiatrists, and other mental health practitioners, as set forth in *Munstermann*, is the same duty that was required of the defendants in this case, except for the City defendants. The district court then stated that

> there is no allegation contained in [the appellants'] Second Amended Complaint which suggests that . . . Loyd ever indicated in any way, any thought or suggestion of causing harm to specifically Melissa . . . the decedent herein. . . . Nowhere in [the appellants'] Second Amended Complaint is there an allegation that . . . Loyd indicated in any manner to any of the named Defendants his thoughts regarding or his intention to cause any injury to the victim Melissa . . . .

Accordingly, the district court determined that based on the facts alleged in the second amended complaint, the Lasting Hope defendants and the UNMC defendants did not owe a duty to Melissa.

The district court further determined that based on the allegations set forth in the second amended complaint, the City defendants owed no duty to Melissa. Therefore, the district court granted all the defendants' motions to dismiss. The district court gave the appellants 2 weeks to amend their second amended complaint against the City defendants. The appellants did not amend their second amended complaint against the City defendants.

On October 23, 2015, the appellants filed a motion to alter or amend the October 19 order or, in the alternative, a motion to certify the October 19 order as a final judgment. The appellants requested that the district court determine that the defendants owed a duty to Melissa. The appellants also sought leave to amend their second amended complaint with respect to the UNMC defendants by adding the sentence: "'Loyd sufficiently communicated to Defendants a serious threat of physical violence to a reasonably identifiable victim. Melissa . . . was a reasonably identifiable victim.'"

On November 24, 2015, the district court filed an order in which it denied the appellants' motions. Specifically, the court denied the appellants leave to amend the second amended complaint, stating that the amendment would be futile. In its November 24 order, the district court further acknowledged

that the appellants had not amended their second amended complaint against the City defendants and that therefore, "this action must stand as dismissed against" the City defendants.

The appellants do not appeal the district court's determinations with respect to the City defendants, and they are not parties to this appeal. However, the appellants do appeal the dismissals as to the Lasting Hope defendants and the UNMC defendants, as well as the denial of their motion to amend the allegations in the second amended complaint relative to the UNMC defendants.

The appellants filed a timely appeal.

## ASSIGNMENTS OF ERROR

The appellants claim, consolidated and restated, that the district court erred when it (1) dismissed the appellants' second amended complaint against the Lasting Hope defendants and the UNMC defendants for failing to allege facts that showed they owed a duty to Melissa and (2) denied the appellants' motion for leave to amend the allegations in their complaint relating to the claims against the UNMC defendants.

## STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss is reviewed de novo. *Tryon v. City of North Platte*, 295 Neb. 706, 890 N.W.2d 784 (2017).

[2] With respect to the proper standard of review for a denial of a motion to amend a pleading, we have stated that we review a district court's denial of a motion for leave to amend a complaint for an abuse of discretion. *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017). However, we review de novo an underlying legal conclusion that the proposed amendments would be futile. *Id.*

## ANALYSIS

*Review of Orders of Dismissal.*

[3] The appellants claim that the district court erred when it granted the motions to dismiss for failure to state a claim

filed by the Lasting Hope defendants and the UNMC defendants. When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusions. *Tryon v. City of North Platte, supra*. Accordingly, for the purpose of reviewing the court's dismissal of the second amended complaint, the facts that we have set out in this opinion are the facts as alleged by the appellants which we accept as true.

[4] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Id*. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id*.

[5,6] Nebraska is a notice pleading jurisdiction. Civil actions are controlled by a liberal pleading regime; a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted. *Id.* The rationale for this liberal notice pleading standard in civil actions is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage. *Id*.

*Lasting Hope Defendants.*

The appellants contend that, due to their custodial relationship with Loyd, the Lasting Hope defendants owed a common law duty of care to protect Melissa from Loyd and that the district court erred when it granted the motions to dismiss as to these defendants. We find merit to this assignment of error.

In their second amended complaint, the appellants allege that Lasting Hope is an affiliate of CHI Health Alegent Creighton Clinic, which in turn is an affiliate of CHI Health. They further allege that John Doe #1 and John Doe #2 are employees of Lasting Hope. The appellants also allege that Jane Doe Nurse #1 is an employee of a Noll entity and that Lasting Hope contracted with a Noll entity for its services. Given the foregoing relationships and for the sake of simplicity as we indicated above, we will sometimes refer to these defendants as the Lasting Hope defendants. We further note that within the group of Lasting Hope defendants, certain entities are employers and that the appellants allege that such defendants are liable under the doctrine of respondeat superior. Under the doctrine of respondeat superior, an employer is held vicariously liable for the negligent acts of an employee committed while the employee was acting within the scope of the employer's business. *Holloway v. State*, 293 Neb. 12, 875 N.W.2d 435 (2016).

[7,8] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Pittman v. Rivera*, 293 Neb. 569, 879 N.W.2d 12 (2016). The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id*.

[9-11] In *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010), we adopted the approach of 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010), and held that an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. After *A.W.*, the existence of a duty generally serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances. *Phillips v. Liberty Mut. Ins. Co.*, 293 Neb. 123, 876 N.W.2d 361 (2016). Moreover, "[d]uty rules are meant to serve as broadly applicable guidelines

for public behavior, i.e., rules of law applicable to a category of cases." *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. at 212-13, 784 N.W.2d at 914-15. Whether a duty exists is a policy decision. *Phillips v. Liberty Mut. Ins. Co., supra*.

With respect to a defendant's duty to control the behavior of a third party, we noted in *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012), that this court had previously relied on the Restatement (Second) of Torts § 315(a) at 122 (1965), which provided that there is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another, unless "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct," and explained that "[o]ne who takes charge of a third person whom he knows or should know [is] likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm," *id*., § 319 at 129. See, also, *Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003).

Similarly, § 37 of 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012), which we referred to approvingly in *Ginapp v. City of Bellevue, supra*, explains that an actor whose conduct has not created a risk of physical harm to another has no duty of care to that other person, unless an affirmative duty created by another circumstance is applicable. Such an affirmative duty can arise from the circumstance of a special relationship.

We have previously adopted certain special relationship provisions found in the Restatement (Third), *supra*. In particular, we have adopted special relationship provisions in § 40 regarding the duty owed to another with regard to risks that arise within the relationship. See, *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d 444 (2015) (landlord-tenant relationship in § 40(b)(6)); *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012) (employer-employee relationship in § 40(b)(4)).

Special relationships are also described in § 41 of the Restatement (Third), *supra*. Section § 41(a), which we referred to in *Ginapp v. City of Bellevue, supra*, provides: "An actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship." Section 41(b) lists special relationships, including the custodial relationship as follows: "Special relationships giving risk to the duty provided in Subsection (a) include: . . . (2) a custodian with those in its custody." In this regard, we note that the comments to § 41 state that custodial relationships include a jailer of a dangerous criminal and hospitals for the mentally ill and for those with contagious diseases. See 2 Restatement (Third), *supra*, § 41, comment *f*. We believe § 41(b) is consistent with our jurisprudence and prudent. We therefore adopt the custodial special relationship outlined in § 41(b)(2) of the Restatement (Third), *supra*, at this time.

We have stated that the duty of a custodian to prevent a person in custody from causing harm to others is premised on the degree of control afforded to one who "'takes charge'" of another. *Ginapp v. City of Bellevue*, 282 Neb. 1027, 1034, 809 N.W.2d 487, 493 (2012). The Restatement (Third) explains that the custodial relationship need not be "full-time physical custody giving the custodian complete control over the other person," but that to the extent that "there is some custody and control of a person posing dangers to others, the custodian has an affirmative duty to exercise reasonable care, consistent with the extent of custody and control." 2 Restatement (Third), *supra*, § 41, comment *f*. at 67. See, also, *Ginapp v. City of Bellevue, supra*.

In this case, we determine that the appellants have alleged sufficient facts in their second amended complaint, which we accept as true, to show that Loyd was in Lasting Hope's custody and that therefore, such facts give rise to a duty. The appellants allege that the OPD had taken Loyd into emergency protective custody and transferred him to Lasting Hope. Pursuant

to § 71-919 of the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 71-901 to 71-962 (Reissue 2009 & Cum. Supp. 2016), an individual admitted under emergency protective custody is to undergo a mental health evaluation to be performed by a mental health professional within 36 hours of being admitted to a mental health facility. Section 71-919(4) provides that such an individual is to be released from emergency protective custody after the completion of such evaluation, unless the mental health professional determines that the person is mentally ill and dangerous or a dangerous sex offender.

According to the second amended complaint, Loyd was transferred to Lasting Hope on August 8, 2013, under emergency protective custody. He underwent a mental health evaluation and was found not to be a danger to himself or others. However, Lasting Hope did not discharge Loyd after the completion of the mental health evaluation. In fact, the allegations are to the contrary.

The appellants allege that on August 12, 2013, Loyd called the OPD from Lasting Hope to turn himself in on his outstanding arrest warrant. The appellants alleged that when the officers arrived at Lasting Hope to arrest Loyd, "Lasting Hope represented to Officer Doe #1 and Officer Doe #2 that Loyd could not be released and an arrest could not be made because the [emergency protective custody] hold was still in effect." The appellants further alleged that "[d]espite the OPD's efforts to take Loyd into their custody and control, Lasting Hope prevented Loyd from leaving." According to the appellants, Jane Doe Nurse #1 in particular "was responsible for the discharge of Loyd and involved in the failure to properly review the circumstances of Loyd's admission and communicate effectively to the OPD that Lasting Hope planned to release Loyd."

These facts alleged in the appellants' second amended complaint, which we accept as true, are sufficient to demonstrate that Lasting Hope had "taken charge" of Loyd. Lasting Hope

did not allow Loyd to be released into the OPD's custody when the officers arrived at Lasting Hope to arrest him on his outstanding warrant, even though it appears that emergency protective custody had expired. Taking these allegations as true, they show that by not releasing Loyd into the OPD's custody, Lasting Hope demonstrated that it had taken charge of Loyd and had established custody over him. Accordingly, based on the facts as pled in the second amended complaint, Lasting Hope had Loyd in its custody, and applying § 41(b) of 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012), noted above, the Lasting Hope defendants therefore owed a duty of reasonable care to third parties, including Melissa, with regard to risks posed by Loyd, consistent with the nature and extent of custody exhibited by Lasting Hope. The district court erred when it determined that the Lasting Hope defendants did not owe a duty to Melissa. We further determine that the appellants pled sufficient facts which could establish that the Lasting Hope defendants breached the duty owed to Melissa. The appellants allege in their second amended complaint that "[o]n August 14, 2013, Loyd left Lasting Hope on his own, without supervision, being questioned or stopped, and without Lasting Hope even noticing he was gone." The appellants allege that Lasting Hope failed to inform the OPD that Loyd had left its premises and failed to warn Melissa that Loyd was no longer at Lasting Hope. The appellants further allege that the Lasting Hope defendants' actions and inaction were the proximate cause of Melissa's death.

Accepting these facts as true, we determine that the appellants alleged sufficient facts to state claims against the Lasting Hope defendants which are plausible on their face. Thus, we determine that the district court erred when it granted the motions to dismiss and dismissed the appellants' case with respect to these defendants. We reverse the decision of the district court with respect to the Lasting Hope defendants

and remand the cause for further proceedings consistent with this opinion.

*UNMC Defendants.*

The appellants contend that because the UNMC defendants had a duty to warn Melissa or otherwise protect Melissa from Loyd's violent behavior, the district court erred when it granted the motion to dismiss filed by these defendants or, in the alternative, the district court erred when it denied the appellants' motion to amend the allegations in the second amended complaint which relate to claims against the UNMC defendants. We assume in our analysis that the proposed amendment is given in good faith. With this understanding, we find merit to appellants' assignment of error in which they claim that denial of their motion to amend was error.

In its order granting the motions to dismiss, the district court acknowledged that the appellants' second amended complaint contained an allegation that Loyd "'expressed feelings of violence,'" but nevertheless concluded that an absence of an allegation that "Loyd indicated in any manner to any of the named Defendants his thoughts regarding or his intention to cause any injury to the victim Melissa . . . is fatal." The appellants contend that the allegations taken together were sufficient to state a cause of action against the UNMC defendants but that in any event, this perceived flaw can be cured by an amendment adding the following sentence: "Loyd sufficiently communicated to Defendants a serious threat of physical violence to a reasonably identifiable victim. Melissa . . . was a reasonably identifiable victim." In denying appellants' motion to amend, the district court stated that the amendment would be futile. We review de novo a trial court's conclusion that a proposed amendment would be futile. *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017). In this case, we conclude that the district court erred as a matter of law.

We have stated that "'[a] district court's denial of leave to amend pleadings is appropriate only in those limited

circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.'" *Estermann v. Bose*, 296 Neb. at 251, 892 N.W.2d at 873, quoting *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015).

In *Estermann*, we quoted the Nebraska Court of Appeals' opinion in *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), which held that where leave to amend is sought

> before discovery is complete and before a motion for summary judgment has been filed, the question of whether such amendment would be futile is judged by reference to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) [now codified as Neb. Ct. R. of Pldg. [§] 6-1112(b)(6)]. Leave to amend in such circumstances should be denied as futile only if the proposed amendment cannot withstand a rule 12(b)(6) motion to dismiss."

296 Neb. at 253, 892 N.W.2d at 875, quoting *Bailey v. First Nat. Bank of Chadron, supra*.

In this case, the appellants sought to amend their second amended complaint after the district court had granted the defendants' motion to dismiss, but before discovery was complete and before a motion for summary judgment had been filed. Therefore, the appellants' motion for leave to amend should have been denied as futile only if the complaint with the addition of the proposed amendment cannot withstand a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6).

With respect to the existing second amended complaint, paragraph 48 alleges that "[d]uring this time, Loyd was an imminent danger to himself and Melissa" and paragraph 53 alleges that "[a]t all times, Loyd remained mentally ill and dangerous to himself, Melissa, and others." In their motion to amend, the appellants sought to amend their second amended complaint by specifically adding the sentence: "Loyd sufficiently communicated to Defendants a serious threat of

physical violence to a reasonably identifiable victim. Melissa . . . was a reasonably identifiable victim." In order to determine the propriety of the ruling on the proposed amendment, we review the applicable substantive law.

Although Jane Doe Physician #1 is a psychiatrist, we refer to statutes regarding mental health practitioners for our legal framework. Mental health treatment providers are liable for failing to warn of a patient's threatened behavior only under certain exceptional circumstances. The Mental Health Practice Act, see Neb. Rev. Stat. §§ 38-2102 to 38-2139 (Reissue 2016), and the Psychology Practice Act, see Neb. Rev. Stat. §§ 38-3101 to 38-3132 (Reissue 2016), contain limits on liability. A mental health practitioner or psychologist is not liable for failing to warn of a patient's threatened behavior unless the patient has communicated to the practitioner a serious threat of physical violence to a reasonably identifiable victim. See §§ 38-2137(1) and 38-3132(1).

[12] The pertinent statute in the Mental Health Practice Act, § 38-2137(1), states:

> There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is licensed or certified pursuant to the Mental Health Practice Act for failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except when the patient has communicated to the mental health practitioner a serious threat of physical violence against himself, herself, or a reasonably identifiable victim or victims.

Section 38-2137(2) goes on to state:

> The duty to warn of or to take responsible precautions to provide protection from violent behavior shall arise only under the limited circumstances specified in subsection (1) of this section. The duty shall be discharged by the mental health practitioner if reasonable efforts are made

> to communicate the threat to the victim or victims and to a law enforcement agency.

A section in the Psychology Practice Act, § 38-3132(1), is substantially similar to § 38-2127(1) of the Mental Health Practice Act. Section 38-3132(1) provides:

> No monetary liability and no cause of action shall arise against any psychologist for failing to warn of and protect from a client's or patient's threatened violent behavior or failing to predict and warn of and protect from a client's or patient's violent behavior except when the client or patient has communicated to the psychologist a serious threat of physical violence against a reasonably identifiable victim or victims.

In *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006), we noted that there was no comparable statute addressed to potential liability of a psychiatrist. But we nevertheless concluded that the duty described in the foregoing statutes should be required of psychiatrists. In *Munstermann*, we stated that "a duty to warn and protect arises only if the information communicated to the psychiatrist leads the psychiatrist to believe that his or her patient poses a serious risk of grave bodily injury to another." 271 Neb. at 848, 716 N.W.2d at 85. We stated that the "question is whether a serious threat of physical violence was actually 'communicated' to the psychiatrist." *Id*.

In the appellants' second amended complaint, the appellants alleged that Loyd had assaulted and battered Melissa in June 2013 and that the OPD had been contacted regarding the incident. The OPD completed a domestic violence report regarding the incident, and an investigation was ongoing. The appellants also alleged that Melissa contacted the OPD at various times in July and August regarding Loyd's violence toward her.

On August 7, 2013, the OPD issued an arrest warrant for Loyd for the misdemeanor assault and battery of Melissa. The appellants specifically alleged that Lasting Hope was "aware

of his misdemeanor warrant" attributable to his prior violence toward Melissa. On August 8, when speaking with the OPD, Loyd "expressed a desire to kill," and he was therefore placed under emergency protective custody and transferred to Lasting Hope. The appellants alleged that "Lasting Hope knew or should have known that the [emergency protective custody] hold placed on Loyd was the result of Loyd threatening to kill his mother and professing he was a danger to himself and others." The appellants specifically allege that while he was at Lasting Hope, Loyd made repeated calls to Melissa from Lasting Hope's landline telephone.

In this case, the appellants allege in their second amended complaint that Jane Doe Physician #1, a psychiatrist employed by UNMC, conducted a mental health evaluation of Loyd. Jane Doe Physician #1 was brought in to evaluate Loyd, and for purposes of this lawsuit, the scope of the duty of Jane Doe Physician #1 was dictated by the context and purpose for which she was consulted. As we noted above, Loyd was taken to Lasting Hope pursuant to the emergency protective custody provisions of the Nebraska Mental Health Commitment Act. Section 71-919(4) provides:

> The administrator of the facility shall have such person evaluated by a mental health professional as soon as reasonably possible but not later than thirty-six hours after admission. The mental health professional shall not be the mental health professional who causes such person to be taken into custody under this section and shall not be a member or alternate member of the mental health board that will preside over any hearing under the Nebraska Mental Health Commitment Act or the Sex Offender Commitment Act with respect to such person. A person shall be released from emergency protective custody after completion of such evaluation unless the mental health professional determines, in his or her clinical opinion, that such person is mentally ill and dangerous or a dangerous sex offender.

The language of the quoted statute described the context of Jane Doe Physician #1's task: to evaluate Loyd to determine whether he was mentally ill and dangerous. Paragraphs 27 et seq. of the second amended complaint refer to and cite the emergency protective custody provisions, and it flows from § 71-919(4) that in Jane Doe Physician #1's evaluation of the person in custody, Loyd would be called upon to communicate to Jane Doe Physician #1 information bearing on his dangerousness with respect to himself or others. Under *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006), Jane Doe Physician #1, a psychiatrist, is exposed to liability in the limited circumstance where information has been communicated to her which leads her to believe that Loyd poses a serious threat of physical harm against a reasonably identifiable victim. Given the existing allegations in the second amended complaint, the addition of the proposed amendment results in a complaint which under *Munstermann* and by application of respondeat superior, states a cause of action against the UNMC defendants and can withstand a motion to dismiss under § 6-1112(b)(6).

Upon our de novo review, we conclude that leave to amend would not be futile and that the district court's legal conclusion to the contrary was error. We conclude that the district court erred when it denied the appellants' motion to amend and dismissed the appellants' case with respect to the UNMC defendants. We reverse the rulings of the district court denying the appellants' motion to amend and dismissing the UNMC defendants and remand the cause for further proceedings consistent with this opinion.

## CONCLUSION

We determine that the district court erred when it dismissed the appellants' second amended complaint for failure to state a claim with respect to the Lasting Hope defendants. We further conclude that appellants' proposed amendment would not be futile and that the district court erred when it

denied the appellants' motion to amend the second amended complaint and dismissed the action as to the UNMC defendants. Therefore, the court's order dismissing the appellants' complaint as to the Lasting Hope defendants and the UNMC defendants and its further order denying the appellants' motion for leave to file an amended complaint are reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

Wright, Cassel, and Funke, JJ., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Earnest D. Jackson, appellant.

899 N.W.2d 215

Filed June 23, 2017. No. S-16-506.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Constitutional Law: States: Minors: Convictions: Sentences: Probation and Parole.** It is unconstitutional for a state to impose a sentence of life imprisonment without parole on a juvenile convicted of a nonhomicide offense.
4. **Minors: Convictions.** Juvenile offenders convicted of nonhomicide crimes must be given some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.
5. **Minors: Convictions: Homicide: Sentences.** In *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the U.S. Supreme Court declined to extend a categorical bar of no life-without-parole sentences to juveniles convicted of homicide.
6. **Minors: Sentences.** A sentencer must take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.
7. **Constitutional Law: States: Courts: Time: Appeal and Error.** When a new substantive rule of constitutional law controls the outcome of a case, the federal Constitution requires state collateral review courts to give retroactive effect to that rule.
8. **Minors: Convictions: Homicide: Sentences.** A juvenile offender convicted of a homicide offense may be sentenced to life imprisonment without parole so long as the sentencer considered specific, individualized factors before handing down that sentence.

9. **Sentences: Judgments.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## NATURE OF CASE

In 2000, a jury found Earnest D. Jackson guilty of first degree murder but acquitted him of the use of a deadly weapon charge. The court sentenced him to life imprisonment for the first degree murder conviction. On direct appeal, we affirmed Jackson's conviction and sentence.[1]

This is Jackson's appeal from the district court's order resentencing him for his first degree murder conviction. At the time of the crime, Jackson's age was 17 years 10 months. The resentencing was required under the U.S. Supreme Court's decisions in *Miller v. Alabama*[2] and *Montgomery v. Louisiana*[3] and this court's decision in *State v. Mantich*.[4] Following a full evidentiary hearing and arguments, Jackson was resentenced

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[1] *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

[2] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[3] *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

[4] *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014).

in accordance with Nebraska statutes. Jackson appeals his resentencing. We affirm.

## FACTS

### Facts of Crime and Direct Appeal

In Jackson's direct appeal, we set forth the facts upon which his conviction was supported. On August 31, 1999, Robert Sommerville, Shawon McBride, Dante Chillous, and Jackson were riding in a gray Cadillac, without a particular destination. They ended up near the Redman Apartments, where they conversed in the parking lot with a group of people. Sommerville testified that they spoke with Shalamar Cooperrider, then followed Cooperrider to his aunt's house, where Chillous and Jackson got out of the car. At some point, McBride picked up Cooperrider and Jackson at Jackson's house and dropped them off at an alley a block south of Redman Avenue.

Lance Perry resided in an apartment located at 4614 Redman Avenue with his mother, Margaret Parrott, and his sister Elizabeth Williams. On the evening of August 31, 1999, Parrott and Perry were outside the apartment until Parrott went inside at 11:30 p.m. Perry stayed outside with Elexsis Fulton.

While Perry and Fulton were still outside, Cooperrider approached Perry and the two began talking. Fulton, who had never met Cooperrider before that night, described him as "light brown" with a brush haircut, wearing a tan shirt and tan pants. During the conversation, two more men, whom Fulton described, respectively, as light-skinned with a ponytail and dark-skinned with braided hair and a blue "FUBU" brand shirt, came out of the apartment building one door north of Perry's door. At trial, Fulton identified the ponytailed man as Chillous and the man with braids and a FUBU shirt as Jackson. The jury received other testimony that Jackson did not have his hair in braids, but that Chillous wore his hair in a ponytail. Fulton observed Jackson, Cooperrider, and Chillous leave the Redman Apartments in a gray Cadillac after Cooperrider's conversation with Perry.

After the Cadillac departed, Perry entered his apartment and retrieved a .22-caliber Ruger handgun. Parrott and Williams followed Perry out of the apartment, and Parrott observed Perry bending down beside a bush by 4612 Redman Avenue, the apartment building opposite 4614 Redman Avenue. Parrott reentered the apartment.

Fulton testified that the gray Cadillac returned later that evening and that Jackson, Cooperrider, and Chillous got out of the Cadillac. Fulton further testified that Cooperrider had changed from tan clothing to black clothing. Fulton observed the three men approach Perry, at which time, Cooperrider and Perry began arguing. Chillous and Jackson went across the street to Chillous' home, and on their way back, Fulton saw Chillous try to hand Cooperrider a gun. Fulton testified that Jackson got involved in the argument, then pulled out a gun and struck Perry in the head three times. Fulton then ran inside the building and continued to watch from an upstairs window. Fulton testified that Chillous was the first to fire a gun and that he saw Perry being shot in the back while lying on his stomach.

Fulton testified at Jackson's trial that he had no doubt that Jackson shot Perry. Fulton had not known the names of Jackson, Chillous, or Cooperrider before bystanders (who had not witnessed the shooting) told Fulton the names of the three men. Jackson's counsel read into evidence Fulton's testimony from the preliminary hearing that Fulton had learned Jackson's, Cooperrider's, and Chillous' names from the police. Fulton testified that he had identified Jackson, Cooperrider, and Chillous at the preliminary hearing as the men who shot Perry. Fulton had not previously identified Jackson in a photographic or police lineup.

Parrott heard 20 to 30 shots that sounded as if they were coming from different types of guns at different distances; Williams testified that the sound resembled firecrackers. Parrott and Williams ran outside after hearing gunshots and found Perry on the sidewalk with bullet wounds in his stomach. Parrott

removed a gun from Perry's belt and gave it to Williams, telling her to get rid of it. Parrott testified that when she removed Perry's gun by the handle, it was not warm.

Williams testified to seeing a man, dressed in black with dark skin and a brush haircut, fleeing the scene after Perry's shooting, but she did not know and could not identify Jackson. McBride also testified that he saw a man in black firing a gun, standing by the bushes located near 4612 Redman Avenue. Although McBride did not see the shooter's face, he stated that the shooter wore the same kind of clothing Cooperrider had been wearing. McBride confirmed that he had seen Jackson with Cooperrider shortly before the shooting.

Jackson's aunt testified that at 11:19 p.m. on August 31, 1999, Jackson knocked on her door, entered her home, talked with her, and went into her basement around 11:30 p.m. to play a video game. Approximately 20 minutes later, Jackson's cousin knocked on the aunt's bedroom door to get the cordless telephone and asked her if she had heard gunshots. She had not. Jackson's aunt and cousin testified that Jackson had stayed at the aunt's home that night.

Officer Harold Scott of the Omaha Police Department arrived at the scene of the shooting at approximately 12:30 a.m. and discovered Perry's body on the sidewalk in front of 4614 Redman Avenue, surrounded by a crowd of people. Omaha police officer Stefan Davis, upon nearing the scene of the murder, was notified of people who had fled the area. Later, Davis received notification that all suspects were in custody. Jackson, however, was not arrested until October 9, 1999.

Dr. Jerry Jones, who performed the autopsy, determined that Perry died of multiple gunshot wounds that perforated his heart, both lungs, liver, spleen, colon, and kidney. Jones testified that he had examined Perry's body thoroughly and that he did not see abrasions on Perry's head or scalp.

Identical informations were filed against Jackson, Cooperrider, and Chillous in Douglas County District Court, charging each of them with first degree murder and use of

a deadly weapon during the commission of a felony in the death of Perry. The cases were consolidated for trial on the State's motion, but the district court subsequently vacated this order on the State's motion. Jackson's trial, having the lowest docket number, began first, followed by Cooperrider's and Chillous' trials.

The jury found Jackson guilty of first degree murder, but acquitted him of using a deadly weapon to commit a felony. Jackson then filed a motion for new trial, claiming that Fulton's testimony regarding Cooperrider and Chillous did not have proper foundation, that the jury's verdict was inconsistent and self-contradictory, that the court addressed the jury outside the parties' presence after the jury retired for deliberations, and that there was insufficient evidence to sustain a conviction of first degree murder. The district court overruled Jackson's motion and sentenced him to life imprisonment. Further facts surrounding Perry's shooting are set forth below as necessary.

At Cooperrider's own trial, he testified that he was present at the scene, that he fired his handgun several times in self-defense, and that he did not see Jackson at the scene. Cooperrider also testified that Jackson was not one of the people who shot Perry. Instead, Cooperrider testified that Sommerville and one of Sommerville's friends were present at Perry's shooting. Cooperrider testified that Sommerville wore his hair in braids at the time of Perry's death, in a hairstyle similar to Jackson's. At Chillous' trial, Cooperrider again testified that Sommerville and a friend of Sommerville's were present at the scene of Perry's shooting, but he did not see Jackson or anyone else at the scene. Juries acquitted both Cooperrider and Chillous.

Stephen Kraft, Cooperrider's attorney, submitted an affidavit stating that prior to Jackson's trial, Jackson's counsel contacted Kraft to inform Kraft of his intent to subpoena Cooperrider as a witness on Jackson's behalf for Jackson's trial. Kraft informed Jackson's counsel that because Cooperrider

was awaiting trial on identical charges in the same matter, he would not be willing to testify and would invoke his Fifth Amendment right against self-incrimination and refuse to testify if called. Jackson served Kraft with a subpoena directing Cooperrider's presence as a witness at Jackson's trial, but Kraft again advised Jackson's counsel that Cooperrider would, if called, invoke his right against self-incrimination.

Jackson filed a second motion for new trial, alleging that Cooperrider's testimony from Cooperrider's and Chillous' trials provided new evidence that would have changed the jury's verdict in Jackson's trial. The district court overruled Jackson's motion for new trial, finding that Cooperrider's testimony was not newly discovered, but only newly available—Cooperrider merely controlled the dissemination of his testimony for tactical reasons. In its order, the district court referred to telephone conversations in which Cooperrider discussed coordinating his testimony with Chillous and other witnesses testifying at Chillous' trial. The district court concluded that even if Cooperrider's testimony had been presented at Jackson's trial, the jury still heard sufficient evidence to convict Jackson.

In Jackson's direct appeal, this court rejected his argument that the jury's verdicts were contradictory and inconsistent. We concluded that under the aiding and abetting instruction, which accurately stated the law and to which Jackson did not object, the jury could find that Jackson was guilty of first degree murder while also finding that he "did not personally fire a deadly weapon."[5] We also rejected his argument that the evidence was insufficient to support his conviction. Jackson contended that because investigators had found bullet casings from locations that showed Perry was shot from multiple angles and because the autopsy showed no bruising or abrasion on Perry's head, Fulton's account of the crime was not accurate and Fulton had changed his testimony. However, we characterized his

[5] *Jackson, supra* note 1, 264 Neb. at 432, 648 N.W.2d at 292.

argument as attacking the witnesses' credibility and rejected it. We recited evidence that the location of bullet casings could not conclusively prove a gun had been fired from that same location, that Perry did have an abrasion under his left eye, and that Fulton was sure Jackson had shot Perry.

Finally, we concluded that Cooperrider's subsequent exculpatory testimony was not newly discovered evidence. Instead, it was newly available evidence that did not provide a basis for a new trial. We agreed with the Ninth Circuit that allowing a new trial so a codefendant could testify after the government could no longer retry the codefendant would encourage perjury.[6] We also reasoned that Jackson knew Cooperrider's testimony would have been beneficial to him or he would not have attempted to secure it. We cited many cases in which courts have held that the posttrial testimony of a codefendant or coconspirator who refused to testify at the defendant's trial is not newly discovered evidence.[7]

### Postconviction and Resentencing

In Jackson's operative postconviction motion, he sought an order vacating the judgment of conviction and sentencing, because the orders were void or voidable under the U.S. and Nebraska Constitutions. He alleged that his trial attorney was ineffective for several reasons, including his failure to object to arguments or evidence about gang affiliations and activities.

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[6] *Jackson, supra* note 1, citing *U.S. v. Reyes-Alvarado*, 963 F.2d 1184 (9th Cir. 1992).

[7] *Id.*, citing *U.S. v. Freeman*, 77 F.3d 812 (5th Cir. 1996); *U.S. v. Theodosopoulos*, 48 F.3d 1438 (7th Cir. 1995); *U.S. v. Muldrow*, 19 F.3d 1332 (10th Cir. 1994); *U.S. v. Dale*, 991 F.2d 819 (D.C. Cir. 1993); *Reyes-Alvarado, supra* note 6; *State v. Bright*, 776 So. 2d 1134 (La. 2000); *State v. Warren*, 592 N.W.2d 440 (Minn. 1999); *State v. Redford*, 248 Kan. 130, 804 P.2d 983 (1991); *Yarbrough v. State*, 57 S.W.3d 611 (Tex. App. 2001); *State v. Dunlap*, 187 Ariz. 441, 930 P.2d 518 (Ariz. App. 1996); *State v. Jackson*, 188 Wis. 2d 187, 525 N.W.2d 739 (Wis. App. 1994). But see, *U.S. v. Montilla-Rivera*, 115 F.3d 1060 (1st Cir. 1997); *Totta v. State*, 740 So. 2d 57 (Fla. App. 1999).

But Jackson's primary argument was that he was effectively sentenced to life without parole for a crime that occurred when he was 17 years old and that this sentence was prohibited by the Eighth Amendment to the U.S. Constitution and Neb. Const. art. I, § 9.

In August 2015, the district court overruled all of Jackson's claims except his request for relief under *Miller*[8] and *Mantich*.[9] At the postconviction hearing, the court received evidence that Jackson was born in October 1981; thus, he was age 17 years 10 months when Perry was killed on August 31, 1999. In October 2015, the court issued an order vacating Jackson's life sentence and scheduled a new sentencing hearing for January 2016.

At the January mitigation hearing, Jackson presented the testimony of Kayla Pope, who is an attorney, a board-certified child and adolescent psychiatrist, and an expert in adolescent brain development. A deposition Pope gave in *State v. Smith*, Washington County District Court, No. CRl3-9000001, was also received at Jackson's mitigation hearing.

Pope testified that she was the director for neurobehavioral research at Boys Town National Research Hospital and the program director for the general psychiatric training program at Creighton Medical Center and the University of Nebraska Medical Center.

Though she had not met with Jackson, Pope testified generally about brain development and how researchers had learned that the brain develops over time, with the last part of the brain to develop being the frontal cortex. She said that the prefrontal cortex is the part of the brain that controls impulsivity and emotional responses and that it is not fully developed in individuals until they reach their mid-20's. Consequently, adolescents are more likely to be impulsive and respond emotionally instead of rationally, especially in an emotionally

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[8] See *Miller, supra* note 2.

[9] *Mantich, supra* note 4.

charged situation. They often fail to appreciate the consequences of their actions. And because they are seeking to individuate from their parents, adolescents seek approval from their peer group, which makes them more susceptible to peer influence in their decisionmaking than adults.

Kirk Newring, a licensed psychologist, performed a forensic psychological evaluation of Jackson shortly before Jackson reached age 34. In conducting Jackson's examination, Newring attempted to address the following mitigating factors, which are set forth in Neb. Rev. Stat. § 28-105.02(2) (Reissue 2016):

> (a) The convicted person's age at the time of the offense;
>
> (b) The impetuosity of the convicted person;
>
> (c) The convicted person's family and community environment;
>
> (d) The convicted person's ability to appreciate the risks and consequences of the conduct; [and]
>
> (e) The convicted person's intellectual capacity[.]

In addition to considering the statutory sentencing factors for offenders under age 18, Newring performed a risk assessment for future violence.

During the evaluation, Jackson denied being abused or neglected as a child and he said he had a typical childhood with a young mother and a strong family. A family friend told Newring that Jackson had a mother and stepfather and good support growing up but that he got in with the wrong crowd. Jackson denied having been in a gang but said that he was around gang people. He did not earn any school credits past the 8th grade and was expelled from school in the 10th grade. At age 17, he was placed at the Youth Rehabilitation and Treatment Center in Kearney, Nebraska, after he violated his parole for being a minor in possession of a handgun. He apparently violated his parole by being in possession of a stolen vehicle. He was paroled in May 1999.

An initial classification report from the Department of Correctional Services completed in 2000 stated that Jackson

was believed to be involved in bullying other inmates and characterized him as evasive, having the potential to "assume a negative leadership role" and to continue to be involved in altercations with others.

Newring's report summarized Jackson's misconduct reports. Jackson had approximately 250 misconduct reports as of November 5, 2015. Notably, Jackson had several violations for drug or intoxicant abuse. Jackson had 25 misconduct reports which resulted in a sanction of disciplinary segregation, including threats or fighting, stepping on a staff member's foot, and minor physical contact with staff which was accidental. The majority of Jackson's misconduct reports occurred before reaching age 25. After age 30, he had about 20 misconduct reports. At the mitigation hearing, Newring testified that a comparison of the number of misconduct reports during Jackson's first 5 years of incarceration to his most recent 5 years "suggests maturing."

Based on psychological testing, Newring found no indications that Jackson suffered from a major mental disorder. But Newring diagnosed him as having personality disorders, including adjustment disorder with anxiety, cannabis use disorder in a controlled environment, and antisocial personality disorder. Newring stated that Jackson will meet the criteria for cannabis use disorder until he has demonstrated sobriety in a community setting and that he met the criteria for antisocial personality disorder because of his early childhood misbehavior, rules violations as an adolescent, and institutional misbehavior as a young adult. He stated that Jackson's improved behavior was consistent with research showing that antisocial behavior reduces in an individual's late 30's to early 40's.

Newring further noted that since being incarcerated, Jackson earned his diploma through the GED program in 2008. Jackson also completed several programs, including "Criminal and Addictive Thinking I [and II]" on October 7 and December 12, 2014; "Group Process" on October 2, 2014; "Recovery Issues

I [and II]" on October 6 and December 9, 2014; "Within My Reach Relationship and Communication Program" on October 15, 2014; "Relapse Prevention I [and II]" on December 9, 2014, and February 9, 2015; "Special Issues" on February 10, 2015; "Long Term Residential Substance Abuse Treatment Program" on February 11, 2015; "Most Improved" in the substance abuse unit from December 2014 through February 2015; "Psychology of Incarceration" on February 10, 2015; "Character & Paradigms Class" in February 2015; and "Common Sense Parenting" on April 15, 2015.

After he completed the substance abuse program, Jackson was asked to participate as a mentor, because he was a positive role model. Although his discharge summary from the program stated that he might relapse if released because of his long incarceration, his prognosis for recovery was good. He was reclassified from maximum custody to medium custody. He had earned enough credits for community custody status, but that classification was not available for anyone serving a life sentence without parole.

Jackson's IQ was in the average range. A test used to measure academic achievement showed he had reached a 12th grade level of performance or higher in all areas.

Newring noted that Jackson now had strong ties with his family members, who were supportive of him. He believed that Jackson's recent sobriety, employment experience with the Department of Correctional Services, and family ties were strengths for him. He found it unlikely that Jackson would "re-experience that context that led to his crime of conviction," because he no longer abused drugs or wanted to impress his peers "in the thug life." He concluded that Jackson presented a low risk for future acts of violence. At the end of this hearing, the court ordered a presentence investigation report and scheduled the sentencing hearing for April 2016.

During the sentencing hearing, the court received as an exhibit a sentencing brief with attachments from Jackson's attorney. Many of the attachments were letters of support to the

judge from Jackson's friends and family members. One letter was from a man who had taught a "self-betterment cognitive restructuring" class that Jackson had participated in. He said he had known Jackson for 3 years and that when the class was over, he asked Jackson to assist as a lay instructor. He said Jackson had demonstrated considerable willingness to improve himself and had used his time and abilities to help other inmates with decisionmaking and conflict resolution.

Some of the attachments were copies of other resentencing orders for different adolescent offenders or newspaper stories about them. Another attachment was a report by the Violence Policy Center that analyzed 2011 data on black homicide victimization. The report showed that for 2011, the national black homicide victimization rate was 17.51 per 100,000. "For that year, Nebraska ranked first as the state with the highest black victimization rate. Its rate of 34.43 per 100,000 was nearly double the national average . . . ." There were 30 black homicide victims in Nebraska that year. A report by the Department of Health and Human Services showed that in Nebraska, homicide was the leading cause of death for African-Americans who were between the ages of 15 and 34. Attached news reports showed that three of the other individuals alleged to be involved in Perry's murder had been killed. Chillous was killed in a 2005 shooting. Later that year, Cooperrider was killed in a shooting. In 2010, Sommerville was killed in a shooting, McBride was sentenced to prison for possession of cocaine with intent to distribute, and Fulton was sentenced to prison for first degree assault. In 2014, Fulton was again sentenced to prison for weapon offenses.

Jackson's attorney argued that the court should rely on the bill of exceptions from Jackson's trial and not police reports in the presentence investigation report, because Jackson's codefendants had testified inconsistently with their police statements and had been impeached on that basis. Jackson argued that two relevant considerations for resentencing were that the jury had found he did not fire a weapon and that he

had necessarily been convicted of aiding and abetting two principals who were acquitted. He argued that Fulton never identified Jackson as a participant until he saw him sitting with his two codefendants at the preliminary hearing and that Sommerville had a hairstyle that was similar to Jackson's when Perry was killed.

Jackson's attorney argued that under *Miller* and *Montgomery*, the court had to consider Jackson's level of participation in Perry's killing and that he had not personally killed anyone. He also argued that Jackson had grown up in "horrific, crime-producing settings" that were "especially dangerous for young black males." He argued that as an adolescent, Jackson was very vulnerable to negative influences and pressures. He stated he had not asked Jackson to take responsibility and express remorse for the murder because he believed that Jackson was innocent and that sometimes innocent people are convicted. He asked the court not to hold Jackson's claim of innocence against him in light of Cooperrider's and Chillous' acquittals. He argued that Jackson's demonstrated capacity for change was a relevant consideration for resentencing under *Montgomery*. Jackson made a personal statement to underscore the negative influence of his early environment on his bad behaviors and his later ability to take responsibility for improving himself and helping others. He explained the support network he would have upon release and asked for a meaningful chance for parole.

Jackson's attorney distinguished the facts of other cases in which the court had resentenced an adolescent offender to a lengthy term of imprisonment. For example, he pointed out that unlike Jackson, the offender in *Mantich* was convicted of using a weapon to commit a felony. He recommended that the court resentence Jackson to a term of 40 to 50 years' imprisonment with credit for time served. This sentence would have resulted in Jackson's serving another 3½ years before he was eligible for parole and another 8½ years before his mandatory discharge.

The State argued that this court had held the evidence was sufficient to support Jackson's conviction for first degree murder and that this conviction was the crime for which Jackson was being resentenced. The deputy county attorney emphasized that his guilt was not at issue. She focused on Fulton's testimony that he had no doubt Jackson had shot Perry and that Jackson had hit Perry in the head first. She stressed that Jackson had left the scene and returned with a gun. And she argued that the court had to consider Jackson's age when Perry was killed, because he was only "a couple months away from not receiving the benefit of *Alabama v. Miller*." She argued that most of the accolades Jackson had received while incarcerated occurred after *Miller* was issued and that even after *Miller*, he had received 22 misconduct reports. She argued that Newring had also assessed adolescent offenders to have a low risk of future violence in two other cases and that he "always considered the defendant's version of the facts rather than the facts in the record."

The court stated from the bench that except "for about 49 days, we wouldn't even be here" and thus Jackson would not have had a chance at parole. It set out the statutory factors that it must consider, including the "person's age, the impetuosity of the convicted person, the defendant's family [and] community environment, his ability to appreciate the risks and consequences of the conduct, [and] the convicted person's intellectual capacity," as well as the report Newring prepared for the court.

The court did not restate the facts of the crime or Jackson's level of participation in the crime. It distinguished the resentencing of the defendant in *Mantich* and another offender, because those crimes involved random acts of violence and a "chance encounter with evil." The court went on to state, "But we still have a person here who is dead, and your client, the defendant, was convicted of his murder, and so I think anything but a substantial period of incarceration would be inappropriate." The court stated that it had crafted a sentence

that would allow Jackson to work toward a future release after a substantial additional period of incarceration. It resentenced Jackson to 60 to 80 years' imprisonment with credit for the 6,044 days that he had served. The court calculated that Jackson would be eligible for parole in about 13½ years. Jackson timely appealed.

## ASSIGNMENT OF ERROR

Jackson assigns that the district court abused its discretion in imposing an excessive sentence because it failed to properly consider the applicable legal principles.

## STANDARD OF REVIEW

[1,2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[10] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[11]

## ANALYSIS

[3,4] In *State v. Nollen*,[12] we set forth the law on the sentencing of juvenile offenders. We noted that in *Graham v. Florida*,[13] the U.S. Supreme Court held that it is unconstitutional for a State to impose a sentence of life imprisonment without parole on a juvenile convicted of a nonhomicide offense and that the Constitution required that those juveniles be given "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[14]

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[10] *State v. Mantich*, 295 Neb. 407, 888 N.W.2d 376 (2016).

[11] *Id.*

[12] *State v. Nollen*, 296 Neb. 94, 892 N.W.2d 81 (2017).

[13] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[14] *Nollen, supra* note 12, 296 Neb. at 118, 892 N.W.2d at 97, quoting *Graham, supra* note 13.

[5,6] We also noted that in *Miller*,[15] the Court declined to extend a categorical bar of no life-without-parole sentences to juveniles convicted of homicide. Instead, the U.S. Supreme Court held that a sentencer must "'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'"[16]

[7] The U.S. Supreme Court, in *Montgomery v. Louisiana*, held that the prohibition in *Miller* of mandatory life imprisonment without parole for juvenile offenders announced a new substantive rule.[17] The Court further held that when a new substantive rule of constitutional law controls the outcome of a case, the federal Constitution requires state collateral review courts to give retroactive effect to that rule.[18]

As a result of the *Miller* holding, our Legislature amended Nebraska's sentencing laws for juveniles convicted of first degree murder.[19] The new sentencing statute mandates that juveniles convicted of first degree murder are to be sentenced to a "maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment."[20] In determining the sentence, the sentencing judge must "consider mitigating factors which led to the commission of the offense."[21] Section 28-105.02(2) sets forth a nonexhaustive list of mitigating factors for the court to consider.

The crux of Jackson's argument is that *Miller* and *Montgomery* require resentencing courts to consider the circumstances of the offense and the extent of the defendant's

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[15] See *Miller, supra* note 2.

[16] *Nollen, supra* note 12, 296 Neb. 118, 892 N.W.2d at 97, quoting *Miller, supra* note 2.

[17] *Montgomery, supra* note 3.

[18] *Id.*

[19] See § 28-105.02.

[20] § 28-105.02(1).

[21] § 28-105.02(2).

participation, the defendant's immaturity and vulnerability to negative influences at the time of the offense, and the defendant's maturation and rehabilitation since the time of the offense.

[8] As we stated in *Nollen*, a juvenile offender convicted of a homicide offense may be sentenced to life imprisonment without parole so long as the sentencer considered specific, individualized factors before handing down that sentence.[22] Here, Jackson was not sentenced to life imprisonment without parole, but to imprisonment for a term of years that allows for parole eligibility.

Furthermore, the record indicates that a full mitigation hearing was held prior to sentencing at which both the State and Jackson were given an opportunity to present evidence. The sentencing court heard from two witnesses called by Jackson and received numerous exhibits offered by Jackson. The court also ordered a presentence investigation, which gave Jackson the ability to present his own written statement as well as various reference letters from his family, friends, and acquaintances.

During the sentencing hearing, the district court stated that it had to consider the fact that a jury convicted the defendant of murder in the first degree. However, the court also stated that it had to consider the mitigating factors set forth in § 28-105.02(2), as well as the psychological evaluation completed by Newring. As a result, we conclude that Jackson's sentence does not violate *Miller* and that therefore, Jackson's lone assignment of error is without merit.

Jackson further argues that the district court erred because it did not consider and make findings concerning (1) the circumstances of the offense and the extent of Jackson's participation, (2) Jackson's immaturity at the time of the offense, (3) Jackson's vulnerability to negative influences at the time

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[22] *Nollen, supra* note 12.

of the offense, and (4) Jackson's demonstrated maturity and rehabilitation since the time of the offense.

However, in *State v. Mantich*, we held that there was no language in *Miller*, nor anything in our case law or in § 28-105.02, that would require specific factfinding at sentencing.[23] We further held that "the Legislature has set forth the sentencing procedure applicable to juveniles who have committed homicide offenses."[24] "That procedure is consistent with *Miller* and with the Eighth Amendment as it is currently interpreted by the U.S. Supreme Court."[25]

[9] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.[26] As a result, upon our review of the record, we conclude that Jackson's sentence was in accordance with both *Miller* and § 28-105.02 and therefore find Jackson's additional arguments to be without merit.

## CONCLUSION

The sentence of the district court is affirmed.

Affirmed.

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[23] *Mantich, supra* note 10.

[24] *Id.* at 418, 888 N.W.2d at 384.

[25] *Id.*

[26] *Nollen, supra* note 12.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Dillon Fales, appellant and cross-appellee, v. County of Stanton, Nebraska, appellee and cross-appellant.

898 N.W.2d 352

Filed June 23, 2017. No. S-16-936.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court must resolve independently of the trial court.
2. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
3. **Political Subdivisions Tort Claims Act: Judgments: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
4. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Damages.** Neb. Rev. Stat. § 13-911 (Reissue 2012) provides a remedy to an innocent third party for damages caused by a law enforcement officer's vehicular pursuit.
5. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** An "innocent third party" under Neb. Rev. Stat. § 13-911 (Reissue 2012) is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.
6. **Police Officers and Sheriffs.** Whether law enforcement sought to apprehend an individual is a mixed question of law and fact.

7. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles.** If during a pursuit under Neb. Rev. Stat. § 13-911 (Reissue 2012) a passenger takes some action that makes him or her become a person sought to be apprehended, the passenger does not remain an innocent third party by virtue of the fact that law enforcement began the pursuit to apprehend the driver only.
8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

Terry M. Anderson and Timothy J. O'Brien, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Vincent Valentino and Brandy R. Johnson for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

## INTRODUCTION

During an alleged vehicular pursuit by law enforcement, an underage passenger threw out beer containers to avoid being apprehended with the evidence. After his vehicle crashed and he was seriously injured, he sued the County of Stanton, Nebraska (County), claiming to be an "innocent third party."[1] Following a trial, the district court determined that when the passenger tossed the beer, he became a subject of the pursuit, thereby disqualifying him as an innocent third party. Because the court's factual findings were not clearly erroneous and its conclusion followed our case law, we affirm the judgment.

## BACKGROUND

### Facts

Dillon Fales and Bryant Irish—both minors—attended a party in a trailer park and consumed beer while there. At

[1] See Neb. Rev. Stat. § 13-911 (Reissue 2012).

approximately 12:45 a.m. on February 9, 2014, they left the party. Irish drove a pickup truck, and Fales sat in the passenger seat.

The trailer park was located south of County Road 844 and just east of where that road intersects Highway 35 in Stanton County. A more direct route back to Norfolk, Nebraska, would have been to turn west onto County Road 844 and then turn onto Highway 35. But because Fales and Irish heard that law enforcement officers were on the way, they took "back roads." Irish therefore turned east out of the trailer park onto County Road 844.

As part of his patrol, Stanton County Deputy Sheriff Michael Petersen had parked his vehicle on the northeast corner of the trailer park. He observed Irish's pickup "fishtail[]" as it turned east onto County Road 844 and decided to follow it. Petersen could not see how many people were inside the pickup.

Irish proceeded east on County Road 844 and then turned south onto County Road 560. Petersen followed. He observed the pickup turn west onto County Road 842 without signaling its turn. Fales testified that when they turned onto County Road 842, they were able to confirm that a sheriff's vehicle was following them.

As Petersen turned onto County Road 842, he activated his emergency lights in an attempt to initiate a traffic stop. He intended to stop the vehicle for a turn signal violation and possibly for speeding. Petersen "called in to dispatch" at 12:54 a.m. When Fales and Irish saw the emergency lights and realized the deputy was following them, Irish asked Fales if they "should run for it or pull over." Fales testified that he shrugged his shoulders and replied, "'I don't know.'" According to Fales, Irish then "[p]retty much floored" the pickup.

Shortly after Irish accelerated, Fales threw an unopened 30-pack box of beer out of the window. He did so because he was scared that they would be pulled over by law enforcement, and he "figured it was better if we didn't have any beer in the

vehicle." Petersen observed several beer cans and a beer box on the road. A transcript of the "radio traffic" shows that at 12:55 a.m., Petersen reported "[b]eer box out, maybe two" and "[t]hey are throwing out more Bud Light beverages." Petersen considered this to be destruction of evidence and to be a part of his apprehension. He formed the opinion that the occupant or occupants in the pickup were minors.

Near the Stanton County line, Petersen slowed and deactivated his emergency lights. It is unclear how far Petersen was behind the pickup at that time.

As the pickup approached a sharp curve, it was traveling too fast for the conditions and left the roadway. An accident reconstructionist opined that the vehicle's minimum speed at the time it began to brake was 86.74 miles per hour. At 12:57 a.m., Petersen radioed: "[T]hey just wrecked. They are in the ditch." The pickup struck a concrete culvert. As a result of the accident, Fales suffered a severe head wound and paralysis from the chest down.

## Pleadings

Fales sued the County, alleging that he was an innocent third party and that the County was strictly liable to him by operation of § 13-911. Fales also alleged that the County was negligent in its pursuit of the vehicle in violation of Neb. Rev. Stat. § 60-6,114(1) and (3) (Reissue 2010).

The County filed an answer and an amended counterclaim for declaratory judgment. The counterclaim alleged that § 13-911(1) and (5) were unconstitutional in violation of Neb. Const. art. III, § 14. It claimed that the legislation was "logrolled by amendment to a non-germane bill that was already engrossed and read pursuant to Legislative Rule." The County also asserted that § 13-911(1) and (2) were unconstitutional because the strict liability standard conflicted with or implicitly amended § 60-6,114(1), (2), and (3), which imposed an ordinary negligence standard on "'police vehicles'" during a pursuit. The County requested, among other things,

a declaration that 1981 Neb. Laws, L.B. 273, was facially unconstitutional, null, and void.

After the district court overruled a motion for summary judgment by the County on its amended counterclaim for declaratory judgment, the County filed an amended answer and second amended counterclaim for declaratory judgment. The amended answer alleged that the County was entitled to sovereign immunity under Neb. Rev. Stat. § 13-910(1) (Reissue 2012). With respect to the County's amended counterclaim, it alleged that § 13-911(1) and (5) were unconstitutional, because their strict liability standard "conflicts with and/or implicitly amends" the ordinary negligence standard contained in Neb. Rev. Stat. §§ 13-903(4) (Reissue 2012) and 13-910(1). It further alleged that a "tort claim alleging strict liability but not negligent conduct by an employee of a political subdivision does not fall within the definition of 'tort claim.'"

### District Court's Judgment

The district court entered judgment in favor of the County. With respect to Fales' first cause of action, the court found that Fales failed to sustain his burden to prove that he qualified as an innocent third party. The court specifically found the following:

- Petersen "affirmed that when observing the destruction of evidence, such as when beer gets thrown out of a vehicle, that his focus of apprehension broadens to include the individual responsible for committing this potential act of concealing criminal activity."
- When Fales threw the box of beer cans out of the pickup, "he was actively engaging in criminal activity which was observed by the law enforcement officer in pursuit of the vehicle."
- "[W]hen Fales threw the beer out of the pickup truck, which Petersen observed, he lost his status as a potential 'innocent third party.'" And although Petersen "did not know it was Fales who was the passenger in the truck, or even if there were any passengers in the truck, Petersen's purpose

> of apprehension broadened to include any and all persons inside the vehicle who may have attempted to destroy or conceal evidence."

The court also rejected Fales' second cause of action asserting negligence under § 60-6,114. Finally, the court "decline[d] to return to the constitutional claim of the [County] under which it previously sought summary judgment and was unsuccessful."

Fales filed a timely appeal, and the County cross-appealed. We moved the case to our docket.[2]

## ASSIGNMENTS OF ERROR

Fales assigns that the district court erred in (1) finding he was not an innocent third party under § 13-911 and (2) dismissing his complaint "on his cause of action under . . . § 13-911."

On cross-appeal, the County assigns that the district court erred in not declaring 1981 Neb. Laws, L.B. 273, § 31, and 1984 Neb. Laws, L.B. 590, § 2, unconstitutional as in violation of Neb. Const. art. III, § 14.

## STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court must resolve independently of the trial court.[3]

[2,3] In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.[4] In such actions, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.[5]

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[2] See Neb. Rev. Stat. § 24-1106 (Reissue 2016).

[3] *Williams v. City of Omaha*, 291 Neb. 403, 865 N.W.2d 779 (2015).

[4] *Id.*

[5] *Id.*

## ANALYSIS

### Statute

[4] Section 13-911 provides a remedy to an "innocent third party" for damages caused by a law enforcement officer's "vehicular pursuit."[6] The statute provides: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer."[7] Thus, to recover under § 13-911, three components must be proved: (1) the person seeking to recover was an innocent third party, (2) law enforcement was engaged in a vehicular pursuit, and (3) the pursuit proximately caused the death, injury, or property damage.

### Innocent Third Party

The district court began and ended its inquiry with the innocent-third-party component. We will likewise begin by considering whether Fales was an innocent third party. If he was not, the County is not liable regardless of whether a vehicular pursuit occurred and whether the pursuit proximately caused his injuries.

[5] An "innocent third party" under § 13-911 is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.[8] In using the phrase "innocent third party," we stated that "the Legislature was concerned with the actions of the third party as those actions may relate to the flight of the driver sought to be apprehended."[9] The district court found that "when Fales threw

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[6] *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

[7] § 13-911(1).

[8] *Werner v. County of Platte, supra* note 6.

[9] *Henery v. City of Omaha*, 263 Neb. 700, 707, 641 N.W.2d 644, 649 (2002).

the beer out of the pickup truck, which Petersen observed, he lost his status as a potential 'innocent third party.'"

[6] Whether law enforcement sought to apprehend an individual is a mixed question of law and fact.[10] Fales contends that the court's conclusion was wrong under both the facts and the law. We disagree.

First, we consider whether the district court's factual findings were clearly wrong. The court noted that Petersen testified in his deposition that even if he had known Fales was a passenger, he had no intent to apprehend Fales. But the court recognized a limitation of the question posed: It did not "relate . . . Fales as the individual who threw the beer out of the vehicle." Indeed, Petersen later testified that he did not have a reason to apprehend Fales because he did not know who Fales was.

Fales contends that there was no "factual basis" for Petersen's conclusion that the beer came from the pickup.[11] Fales directs us to Petersen's deposition, where Petersen testified that he did not see anyone in the pickup throw the beer. Although Petersen may not have observed *who* in the pickup threw the beer, he testified that he realized beer was being tossed from the vehicle. And this perception is supported by the radio traffic. According to a transcript, Petersen reported, in real time, that a beer box had been thrown and that "[t]hey are throwing out more Bud Light beverages."

Fales also challenges the district court's purported reliance on a hypothetical question asked of Petersen. During trial, counsel for the County asked Petersen the following questions:

> Q. Now, when . . . you began to see [beer cans and a beer box] as you . . . were traveling on [County Road] 842 — have you ever been involved with somebody that's jettisoned evidence out of a vehicle?

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[10] See *Werner v. County of Platte, supra* note 6.

[11] Brief for appellant at 24.

A. Yes.
Q. Isn't that called destruction of evidence?
A. Yes, it is.
Q. Isn't that a felony?
A. Yes.
Q. In other words, someone is trying to conceal their criminal activity, are they not?
A. They are.
Q. And when they seek to destroy evidence of a crime, that gets into another level that you would consider as part of your — part of your apprehension?
A. Yes.

Although the question was hypothetical in nature, Petersen's answers square with his deposition testimony that if he had been able to get the pickup stopped, he would have issued a citation to whomever threw the beer out of the window. The court determined that "[e]ven though . . . Petersen did not know it was Fales who was the passenger in the truck . . . Petersen's purpose of apprehension broadened to include any and all persons inside the vehicle who may have attempted to destroy or conceal evidence." In making this determination, the court made logical inferences from the evidence. We cannot say that the court's factual findings were clearly erroneous.

Fales contends that the Nebraska Court of Appeals' decision in *Jura v. City of Omaha*[12] mandates a different result in this case. We disagree. In *Jura*, the Court of Appeals reviewed the trial court's finding that a passenger in a stolen vehicle was not an innocent third party. The officer began a pursuit once he learned that the vehicle was stolen, and the officer testified that he "'wanted everybody inside the vehicle.'"[13] The officer explained: "'When you have a stolen vehicle with multiple occupants, you don't know who stole the vehicle, where it

[12] *Jura v. City of Omaha*, 15 Neb. App 390, 727 N.W.2d 735 (2007).

[13] *Id.* at 397, 727 N.W.2d at 740.

was taken from, who might have been driving it earlier. You don't have that information before you stop the vehicle and question the occupants.'"[14] Similarly, in the instant case, Petersen did not know who in the pickup discarded the beer. It is reasonable to infer that he sought to apprehend everyone within the pickup.

In *Jura*, the Court of Appeals agreed that the passenger was a person sought to be apprehended. The court stated:

> A police officer's grounds for seeking to apprehend occupants in a vehicular chase situation must have a reasonable basis in the law and facts. Such a basis clearly exists in this case, because the vehicle was a stolen vehicle, as opposed to, for example, a chase starting with a traffic violation.[15]

Fales focuses on the latter sentence and asserts that when the pursuit is initiated because of a traffic violation "the pursuing officer intends to apprehend only the driver of the fleeing vehicle, not the other occupants of the vehicle."[16] We agree that this is frequently true at the beginning of such a pursuit.

[7] We reject the notion that a passenger who may have qualified as an innocent third party at the beginning of a pursuit cannot lose that status. If during the pursuit a passenger takes some action that makes him or her become a person sought to be apprehended, the passenger does not remain an innocent third party by virtue of the fact that law enforcement began the pursuit to apprehend the driver only. Here, Fales' act of throwing beer out of Irish's fleeing vehicle was such an action.

Fales also relies to some extent on our decision in *Werner v. County of Platte*.[17] In that case, the trial court found that the

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[14] *Id.*

[15] *Id.* at 397, 727 N.W.2d at 740-41.

[16] Brief for appellant at 19.

[17] *Werner v. County of Platte, supra* note 6.

passenger was an innocent third party even though the passenger was discovered, after the fact, to be in possession of illegal drugs. We affirmed, stating that "the record supports the pertinent factual underpinnings of the court's conclusion, and thus, they are not clearly wrong."[18] We explained that the officer "sought to pull over the car for suspected driving under the influence and speeding—only the driver could have been guilty of those crimes."[19] We agreed with the trial court that the passenger was never the target of the officer's pursuit. Based on *Werner*, Fales contends that "doing something that constitutes a crime during a pursuit does not by itself cause the passengers to become occupants to be apprehended."[20]

The instant case is distinguishable from *Werner* in two key respects. First, the district court here found that Fales was not an innocent third party, while the trial court in *Werner* determined that the passenger was an innocent third party. This is an important distinction under our standard of review: We defer to the trial court's factual findings unless they are clearly wrong, and we consider the evidence in the light most favorable to the successful party. Second, we stated in *Werner* that "[d]uring the pursuit, [the officer] did not know about [the passenger's] breaking the law . . . ."[21] But here, Petersen knew about the beer cans being thrown from the vehicle during the pursuit. While Petersen did not know at the time that it was Fales who threw the beer, he was aware of the law violation during the pursuit.

We agree with the district court that Fales was a person sought to be apprehended in the fleeing vehicle. Because Fales was not an innocent third party, the County is not liable for his injuries under § 13-911.

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[18] *Id.* at 917, 824 N.W.2d at 56.

[19] *Id.*

[20] Brief for appellant at 18.

[21] *Werner v. County of Platte, supra* note 6, 284 Neb. at 919, 824 N.W.2d at 57.

## Cross-Appeal

[8] Because we affirm the district court's judgment finding that the County is not liable for Fales' injuries, we agree with the concession of the County at oral arguments that we need not consider the County's cross-appeal as to the constitutionality of § 13-911. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[22]

## CONCLUSION

We consider the evidence in the light most favorable to the County as the successful party and give it the benefit of every inference that can reasonably be deduced from the evidence. Viewed in that light, the district court's factual findings are not clearly erroneous. We find no error in the court's conclusion that when Fales threw the box of beer out of the window of Irish's fleeing pickup, which was observed by Petersen, Fales became a person sought to be apprehended. Because Fales was therefore not an innocent third party, we affirm the district court's judgment.

Affirmed.

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[22] *Adair Asset Mgmt. v. Terry's Legacy*, 293 Neb. 32, 875 N.W.2d 421 (2016).

Nebraska Supreme Court
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# State of Nebraska, appellee, v. Scott McColery, appellant.

898 N.W.2d 349

Filed June 23, 2017. No. S-16-1017.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
5. **Final Orders: Appeal and Error.** An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Appeal dismissed.

Brett McArthur for appellant.

Joe Kelly, Lancaster County Attorney, and Jason M. Cooper for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

## NATURE OF CASE

Scott McColery posted a $5,000 appearance bond for a crime of which he was later convicted. After posting the bond, McColery assigned the bond funds to his attorney. The State then filed an affidavit of lien for overdue child support. After McColery was convicted, he filed a motion to release the funds to his attorney. That motion was overruled, and McColery appeals.

## FACTS

In September 2015, McColery was charged with strangulation of his girlfriend and was appointed a public defender, though he later obtained a private attorney. Bond was set at $50,000.

On October 5, 2015, McColery posted a $5,000 appearance bond. On October 30, McColery filed an "Assignment of Bond" to his "attorney, Brett McArthur, for his services in the above entitled matter."

On November 18, 2015, the State filed an affidavit of lien for child support indicating that the bond funds held by the court were subject to garnishment for McColery's overdue child support. Attached to the affidavit, a payment history report reflected that as of November 2015, McColery owed over $18,000 in overdue child support.

In June 2016, McColery filed a motion to release the bond funds to his attorney. After a hearing, the motion was overruled in an order dated October 20, 2016. From that order, McColery appeals.

## ASSIGNMENT OF ERROR

McColery's sole assignment of error is that the district court erred as a matter of law in overruling his motion to release the bond funds to his attorney.

## STANDARD OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law.[1] An appellate court independently reviews questions of law decided by a lower court.[2]

## ANALYSIS

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[3]

[4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.[4] Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[5]

[5] The State argues that the order overruling McColery's motion to release the bond funds does not affect a substantial right because it does not affect any party's rights to the bond funds. We agree. An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.[6]

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[1] *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[2] *Id.*

[3] *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013); *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

[4] *Big John's Billiards v. State, supra* note 1.

[5] *Pearce v. Mutual of Omaha Ins. Co.*, 293 Neb. 277, 876 N.W.2d 899 (2016).

[6] *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016).

Here, the subject matter of the litigation was not affected, because the district court's order did not determine the rights of the parties with respect to the bond funds. Although the order indicated that the funds would not be released to McColery's attorney at that time, it did not indicate that the attorney was not entitled to the funds. Nor did it indicate that the State was entitled to the funds. Because the order merely holds the funds in the court, it does not diminish McColery's or his attorney's claim to the funds or eliminate any objection he or his attorney might have to the State's garnishment of the funds for child support.

We conclude that McColery's appeal is premature. The State has not yet initiated garnishment proceedings. When it does, McColery's attorney will be able to intervene pursuant to Neb. Rev. Stat. § 25-1030.03 (Reissue 2016), which allows for a third party claiming ownership to intervene in the garnishment proceedings.

Because we find that the order does not affect a substantial right, it is not a final, appealable order. We therefore dismiss.

## CONCLUSION

There is no final order in this case. The appeal is dismissed as premature.

Appeal dismissed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Jill B. and Travis B., individually and as parents and next friends of B.B., a minor child, appellants, v. State of Nebraska and the Nebraska Department of Health and Human Services, appellees.

899 N.W.2d 241

Filed June 30, 2017. No. S-15-778.

1. **Tort Claims Act: Appeal and Error.** In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Statutes: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
3. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated at a later stage.
4. **Summary Judgment.** The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to judgment as a matter of law.
5. **Actions: Final Orders: Appeal and Error.** The law-of-the-case doctrine requires a final order. A party is not bound by a court's findings in an order that it was not required to appeal.

6. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.
7. **Tort Claims Act: Immunity: Waiver: Pleadings: Proof.** The exceptions found in Neb. Rev. Stat. § 81-8,219 (Reissue 2014) to the general waiver of tort immunity are matters of defense which must be pled and proved by the State.
8. **Pleadings: Notice.** The key to determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense.
9. **Pretrial Procedure: Pleadings.** The issues set out in a pretrial order supplant those raised in the pleadings.
10. **Tort Claims Act: Legislature: Immunity: Waiver.** Through the State Tort Claims Act, the Legislature has waived the State's immunity with respect to certain, but not all, types of tort actions.
11. **Tort Claims Act: Immunity: Waiver.** Under the intentional torts exception, sovereign immunity is not waived for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
12. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
13. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
14. **Tort Claims Act: Immunity: Waiver.** The misrepresentation exception to the waiver of sovereign immunity can apply to claims for personal injuries as well as economic injuries and to claims not involving business transactions.
15. ____: ____: ____. The misrepresentation exception to the waiver of sovereign immunity must be strictly construed in favor of the government.
16. **Tort Claims Act: Immunity: Waiver: Case Disapproved.** *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003), is disapproved to the extent it holds that a complete failure to convey critical information, without an inference that this was deliberately done, falls outside the misrepresentation exception to the waiver of sovereign immunity.

17. **Tort Claims Act: Pleadings.** A plaintiff cannot circumvent the misrepresentation exception simply through artful pleading of its claims.

Appeal from the District Court for Gage County: Paul W. Korslund, Judge. Affirmed.

Ryan P. Watson and Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for appellants.

Douglas J. Peterson, Attorney General, David A. Lopez, and Bijan Koohmaraie for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

## I. INTRODUCTION

A state employee falsely told the parents of a child that K.D.M., a potential adoptee, had no sexual abuse history. Upon placement in their home, K.D.M. sexually assaulted the parents' child. They sued for money damages under the State Tort Claims Act.[1] After a bench trial,[2] the district court found the State of Nebraska and the Nebraska Department of Health and Human Services (collectively the State) immune from suit under the exception for misrepresentation and deceit.[3] The parents appeal, and we affirm. Because the employee consciously deceived the parents, the exception applies. Our decision is driven by the highly deferential standard used to review the district court's factual findings and the strict construction we must give to waivers of sovereign immunity.

## II. BACKGROUND

Because the State prevailed at trial, we summarize the facts in the light most favorable to it.

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[1] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014).

[2] See § 81-8,214 (district court, sitting without jury, has exclusive original jurisdiction).

[3] See § 81-8,219(4).

### 1. Events

In May 2010, the parents, Jill B. and Travis B., became interested in adopting K.D.M. On at least three occasions, Jill asked Jodene Gall, a children and family services specialist with the State, whether K.D.M.'s background had anything "sexually" in it and Gall responded "no." Gall told Jill only that there had been concerns about "inappropriate" contact between K.D.M. and his brother. K.D.M. was placed in the parents' home in July.

Gall, however, was aware of allegations that K.D.M. had been sexually abused. She learned this information by reviewing information contained in the computer database and the master case file, which is a paper file.

Approximately 5 months after K.D.M. was placed in the parents' home, the parents learned that K.D.M. had sexually abused their child.

### 2. Lawsuit

The parents, individually and as parents and next friends of their minor child, brought a negligence claim against the State. They alleged failure to warn or disclose and failure to supervise. The State asserted the affirmative defense of immunity under § 81-8,219(4), claiming that the case constituted a claim arising out of misrepresentation or deceit, because the withholding of information by Gall was intentional.

The State filed a motion for summary judgment, which the district court overruled. The court stated that it was clear Gall intentionally concealed K.D.M.'s sexual history from the parents, but that there was evidence she did not read the reports which detailed the sexual history and was not aware of how serious it was. The court reasoned that it could not conclude Gall's intentional concealment of K.D.M.'s sexual history was the sole proximate cause of damages when there was evidence that the proximate cause was Gall's failure to be fully aware of the file and forensic reports. The matter proceeded to trial.

During the bench trial, Gall testified about her awareness of K.D.M.'s background. When she first spoke with Jill, Gall knew that K.D.M. "had some inappropriate contact" with a relative. Gall believed that she told the parents there had been "inappropriate contact," but she did not believe she elaborated. And Gall testified that she did not know the full extent of K.D.M.'s sexual abuse at that time.

But there was evidence from which the district court could conclude that from the beginning of her contacts with the parents, Gall knew the full extent of K.D.M.'s sexual history. Gall admitted that when K.D.M. was placed with the parents, she was aware of allegations that he had been sexually abused and that he had a history of sexually acting out. She admitted that she was assigned to K.D.M.'s case in 2007 or 2008. She admitted that in 2007, she drafted a "private narrative" section of an adoption form regarding K.D.M. She admitted that the first sentence of the private narrative stated, "'[K.D.M.] would best fit in a family with two parents, preferably no other children.'" She admitted that this opinion "could have been" based on her knowledge of K.D.M.'s sexual history. In an email from Gall to other personnel of the State, Gall recalled the allegations of a particular intake. She admitted at trial that in the email, she was referring to the intake received as exhibit 35. And she admitted that exhibit 35 was the source of her information or knowledge regarding K.D.M.'s sexual history. One of the State's child and family services supervisors explained that the information from this intake form was derived from forensic interviews conducted by a child advocacy center. The supervisor also testified that Gall said "she didn't feel like she would have to call [K.D.M.] a perp for the rest of his life."

### 3. District Court's Judgment

The district court entered judgment in favor of the State. Ultimately, the court reasoned that the State's liability "rises and falls on whether [K.D.M.'s] sexual abuse history was disclosed, not on whether or not the information was available

to [Gall] and whether [Gall] was negligently trained and supervised." The court also stated that "the information was available to [Gall,] and she was not negligently trained and supervised."

The district court made numerous factual findings, and we quote the findings bearing on Gall's intent as follows:

> 8. [Gall] was actually aware that [K.D.M.'s] background included some instances of sexual abuse and inappropriate sexual contact with a sibling at the time of the [parents'] inquiries.
>
> 9. During the preliminary meetings and evaluations, [Gall] also represented to . . . a licensed mental health counselor who was assisting with the placement process[] that [K.D.M.] had no sexual abuse history as either a victim or perpetrator.
>
> 10. [Gall] was not authorized with discretion to withhold relevant information concerning the sexual abuse history of [K.D.M.]
>
> 11. Even while [Gall] knew that [K.D.M.'s] background included allegations of sexual abuse and inappropriate sexual contact and acting out, and despite her awareness that the [parents] were very concerned about whether [K.D.M.] had any history that included sexual activity, [K.D.M.] was placed in the [parents'] home in 2010.

The district court concluded that the parents presented a case "rooted in and inextricably intertwined with multiple instances of misrepresentation" by Gall. Because the State Tort Claims Act "specifically excepts from its waiver of governmental immunity claims that are based on misrepresentation and deceit," the court dismissed the complaint.

The parents filed a timely appeal, and we granted their petition to bypass review by the Nebraska Court of Appeals.

## III. ASSIGNMENTS OF ERROR

The parents assign four errors, which we have restated and reordered. We first address their assignments that the district

court erred in not applying the law-of-the-case doctrine and in finding the misrepresentation exception had been properly asserted as an affirmative defense. We then consider the heart of the appeal, where they attack the court's determination that the State was immune under the exception for misrepresentation or deceit. Finally, we discuss the assignment of error regarding the court's finding that Gall was not negligently trained and supervised.

## IV. STANDARD OF REVIEW

[1] In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.[4]

[2] The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.[5]

## V. ANALYSIS

We briefly dispose of two procedural issues.

### 1. Law-of-the-Case Doctrine

[3] The parents argue that the district court erred in failing to apply the law-of-the-case doctrine. The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated at a later stage.[6]

The parents reason that in overruling the State's motion for summary judgment, the district court determined that immunity did not apply. We disagree for two reasons.

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[4] *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003).

[5] *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016).

[6] *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016).

[4] First, the parents' premise is wrong. The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to judgment as a matter of law.[7] Here, the district court did not decide that immunity did not apply, it merely decided that there was a genuine issue of fact for trial.

[5,6] Second, the law-of-the-case doctrine requires a final order. A party is not bound by a court's findings in an order that it was not required to appeal.[8] But here, neither party was permitted, much less required, to appeal. A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.[9] Thus, the law-of-the-case doctrine did not preclude the district court from addressing immunity at trial.

### 2. Affirmative Defense Asserted

[7,8] The exceptions found in § 81-8,219 to the general waiver of tort immunity are matters of defense which must be pled and proved by the State.[10] The parents contend that the State failed to properly plead the misrepresentation exception as an affirmative defense. But we have recognized that the federal rules of pleading, which Nebraska has generally adopted, were designed to liberalize pleading requirements.[11] The key to determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense.[12]

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[7] *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

[8] *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012).

[9] *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

[10] See *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997).

[11] *SFI Ltd. Partnership 8 v. Carroll*, 288 Neb. 698, 851 N.W.2d 82 (2014).

[12] *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014).

Although the State's operative answer was not perfect, the parents were afforded fair notice of the nature of the defense asserted by the State. Despite references to the "Amended Complaint" throughout the State's answer, the answer was clearly filed in response to the parents' second amended complaint. Indeed, the State's pleading was titled "Defendant's Answer to Second Amended Complaint." The parents also point out that the answer referred to intentional conduct and that their operative complaint alleged only negligent conduct. But the answer, by referring to "misrepresentation or deceit" and to § 81-8,219(4), clearly placed the parents on notice of the State's intent to raise sovereign immunity as a defense. We reject their hypertechnical attempt to parse the State's pleading.

[9] Moreover, the district court's pretrial order cured any question whether the defense was raised. The issues set out in a pretrial order supplant those raised in the pleadings.[13] The court incorporated into its pretrial order an issue framed in the State's pretrial conference statement: "Whether the *intentional torts exception* to the Nebraska State Tort Claims Act operates as a complete bar to [the parents'] recovery from the State." (Emphasis supplied.) The State characterizes this as "shorthand"[14] and correctly notes that we have used this terminology regarding § 81-8,219(4).[15] The parents do not argue that they were misled or surprised by the State's arguments regarding misrepresentation or deceit. This assignment of error lacks merit.

### 3. Misrepresentation Exception

The parents' principal assignment of error asserts that the district court erred in finding their claim fell within the "[m]isrepresentation [e]xception"[16] of the State Tort Claims

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[13] *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996).

[14] Brief for appellees at 12.

[15] See *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

[16] Brief for appellants at 20.

Act. But the parties argue both misrepresentation and deceit. Both terms are specified in § 81-8,219(4).

Before recalling the historical development and basic principles of sovereign immunity and its waiver, a simple illustration is helpful. Imagine two automobiles being operated by employees in the course of performing tasks for their respective employers. If A, an employee of XYZ Corp., becomes distracted and negligently causes injury to another person, XYZ Corp. is liable. If B, an employee of the State, does so, the State is liable. But if A or B becomes enraged at another driver and intentionally collides with the other vehicle, thereby injuring the other driver (a battery), the results differ. XYZ Corp. would be liable for A's intentional act,[17] but the State would be immune from suit for B's similar act. Although this seems counterintuitive, there is a rationale supporting the distinction.

### (a) Sovereign Immunity Prior to State Tort Claims Act

It had been long "laid down as a universal rule that a state is not liable to a person injured by the negligence of its employees, unless there is a statute or constitutional provision permitting recovery."[18] We explained that the constitutional provision[19] permitting the State to be sued is not self-executing and requires legislative action to make it effective.[20]

The rule of sovereign immunity has been characterized as "'an ancient rule inherited from the days of absolute monarchy'"[21] or, less pejoratively, as an inheritance of 18th-century English law.[22] It rests upon a broad doctrine recognizing the right of

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[17] See *Rich v. Dugan*, 135 Neb. 63, 280 N.W. 225 (1938).

[18] *Shear v. State*, 117 Neb. 865, 866, 223 N.W. 130, 130 (1929).

[19] Neb. Const. art. V, § 22.

[20] See *Shear v. State, supra* note 18.

[21] See *Stadler v. Curtis Gas, Inc.*, 182 Neb. 6, 9, 151 N.W.2d 915, 918 (1967) (Newton, J., dissenting; White, C.J., and Carter, J., concurring in dissent).

[22] See Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534 (1947).

sovereign authority to be free of such liability except to the extent that it is waived or abrogated by the Legislature.[23] The doctrine predated our state constitution, which was adopted with this rule in mind.[24]

Although the rule had been challenged for decades,[25] our 1967 decision[26] by a divided court prompted legislative action. As a dissenting judge observed pungently, "logic dictates that a person run over by a state-owned truck should have the same right to recover as one run over by a privately owned truck."[27] Two members of the majority concurred and remarked that the "implications [of the majority opinion] suggest the desirability of legislative action."[28]

(b) State Tort Claims Act

In 1969, the Legislature responded to the call for action.[29] But it did not abolish the rule of sovereign immunity. Instead, it used the Federal Tort Claims Act (FTCA)[30] as a model.

[10] Through the State Tort Claims Act, the Legislature has waived the State's immunity with respect to certain, but not all, types of tort actions.[31] As pertinent here, the act waives the

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[23] See *Stadler v. Curtis Gas, Inc., supra* note 21 (Carter, J., dissenting; White, C.J., and Newton, J., join).

[24] See *id.* (Newton, J., dissenting; White, C.J., and Carter, J., concurring in dissent).

[25] See *id.* (McCown, J., concurring; Spencer, J., joins).

[26] See *id.*

[27] *Id.* at 9, 151 N.W.2d at 918 (Newton, J., dissenting; White, C.J., and Carter, J., concurring in dissent).

[28] *Id.* at 22, 151 N.W.2d at 924 (McCown, J., concurring; Spencer, J., joins).

[29] See 1969 Neb. Laws, L.B. 154. See, also, Minutes of Committee on Judiciary, L.B. 154, 80th Leg., 1st Sess. (Feb. 3, 1969); Committee Statement, L.B. 154, Judiciary Committee, 80th Leg., 1st Sess. (Feb. 6, 1969); Floor Debate, L.B. 154, 80th Leg., 1st Sess. 841 (Mar. 26, 1969).

[30] 28 U.S.C. §§ 1346(b) and 2671 to 2680 (1964 & Supp. III).

[31] See, *Lamb v. Fraternal Order of Police Lodge No. 36*, 293 Neb. 138, 876 N.W.2d 388 (2016); *Johnson v. State, supra* note 15.

State's sovereign immunity for tort claims against the State on account of personal injury caused by the negligent or wrongful act or omission of any employee of the State, while acting within the scope of his or her office or employment, under circumstances in which the State, if a private person, would be liable to the claimant for such injury.[32]

[11] The Legislature included within the act specific exceptions to the waiver of sovereign immunity. Under the intentional torts exception, sovereign immunity is not waived for claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[33] Our attention focuses on misrepresentation and deceit.

(c) Strict Construction

[12,13] It is well settled that statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.[34] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[35]

The principle of strict construction predated the State Tort Claims Act and has been consistently followed after its adoption. We had long said that statutes authorizing suit against

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[32] See § 81-8,210(4).

[33] § 81-8,219(4).

[34] *Lamb v. Fraternal Order of Police Lodge No. 36, supra* note 31.

[35] *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

the State are to be strictly construed, since they are in derogation of the State's sovereignty.[36] Following adoption of the State Tort Claims Act, we emphasized that statutes in derogation of sovereignty should be strictly construed in favor of the State, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the State or its government of any of its prerogatives, rights, or remedies, unless the intention of the Legislature to effect this object is clearly expressed.[37] We also said that because the State has given only conditional consent to be sued and there is no absolute waiver of immunity by the State, requirements of the State Tort Claims Act must be followed strictly.[38] Our most recent pronouncements uphold these principles.[39] Because the rationale for the intentional torts exception, including the exceptions for misrepresentation and deceit, has not always been clearly expressed, the rule of strict construction becomes critically important.

(d) Rationale of FTCA

We have recognized that Nebraska's State Tort Claims Act is patterned after the FTCA.[40] The FTCA contains an intentional

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[36] See *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), *overruled on other grounds, Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985), and *Pointer v. State*, 219 Neb. 315, 363 N.W.2d 164 (1985).

[37] *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), *overruled on other grounds, Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988).

[38] *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984), *disapproved on other grounds, D.K. Buskirk & Sons v. State*, 252 Neb. 84, 560 N.W.2d 462 (1997).

[39] See, e.g., *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014); *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013); *Cotton v. State*, 281 Neb. 789, 810 N.W.2d 132 (2011); *Johnson v. State, supra* note 15.

[40] *Johnson v. State, supra* note 15.

torts exception.[41] Prior to a 1974 amendment[42] not relevant here, the language was identical.

A majority of the U.S. Supreme Court has not spoken to the rationale underlying the intentional torts exception, but a plurality has touched on it. And several commentators and lower federal courts have spoken more directly. We summarize them chronologically to illustrate the rationale's development.

The first comment[43] came from the academy, soon after the FTCA was adopted. Referring to all of the exceptions, including § 2680(h), it argued that because the FTCA was "in itself a denial of the validity of conceptualistic sovereign immunity," the exceptions must seek "justification in some practical necessity."[44] Turning to § 2680(h), its rationale was found in committee hearings of an earlier act and was the "difficulty of defending such suits and the probability of judgments against the Government in amounts out of proportion to the damages actually suffered by claimants."[45] The article recognized that "this sweeping exception imposes a hardship upon claimants and leaves open one fruitful source of private claim bills."[46] In other words, the only remedy in that situation was in Congress and not in the courts.

In a 1954 decision regarding the "assault" and "battery" parts of the exception, the Second Circuit posited that "high standards of public service would be promoted by government employees knowing that they could not engage in such lawless activities at government expense."[47] Alternatively, the court suggested that the excepted activities were viewed as

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[41] See 28 U.S.C. § 2680(h) (2012).

[42] See Pub. L. No. 93-253, § 2, 88 Stat. 50.

[43] See Comment, *supra* note 22.

[44] *Id.* at 543.

[45] *Id.* at 547.

[46] *Id.*

[47] *Panella v. United States*, 216 F.2d 622, 625 (1954).

"practically, even though not legally, speaking [as] outside the scope of a government employee's proper official functions, or in any event unusually difficult for the Government to defend against."[48] Citing to the earlier hearings noted from what the court described as a "meagre legislative history,"[49] the court quoted a Department of Justice representative's testimony that these were "'torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts.'"[50]

The view from the academy in 1957 recognized that these torts were "not actionable under the [FTCA],"[51] and called for Congress to reassess the preservation of this immunity, opining that "the desirability of compensation seems to outweigh the fear of excessive damages."[52] But Congress has not reassessed the exception, except for the 1974 amendment having no application here. And when our Legislature adopted the State Tort Claims Act, it did not vary from the exceptions then existing in the FTCA.

Addressing the assault and battery components of the exception in 1985, a plurality of the U.S. Supreme Court explained that "Congress passed the [FTCA] on the straightforward assurance that the United States would not be financially responsible for the assaults and batteries of its employees."[53]

Two later contributions from the academy provide some guidance. A 2003 article concedes that the intentional torts

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 626.

[51] *Developments in the Law - Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 891 (1957).

[52] *Id.*

[53] *United States v. Shearer*, 473 U.S. 52, 55, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985).

exception was "intended to shield the government from unwieldy claims founded on intentional torts" and that "Congress' intent with regard to intentional torts proximately caused by governmental negligence largely remains a mystery."[54] The most recent article explains that the FTCA's exceptions "underscore the principle that the law does not provide a remedy for every wrong—particularly where the government is concerned."[55] According to the author:

> The FTCA was enacted as one part of a broader legislative "housekeeping" measure—the Legislative Reorganization Act of 1946—whereby Congress removed from itself (or at least greatly reduced) certain time-consuming administrative responsibilities. . . . One long-standing Congressional duty alleviated by the Reorganization Act was the consideration of "private bills," which until that point had been essentially the only way for injured citizens to recover . . . for tortious conduct by government employees . . . .[56]

The author argues that by not using the term "intentional torts," not including all intentional torts in the list of excluded causes of action, and excluding some torts that courts have held need not always be intentional, Congress "made clear its intent to exclude only a subset of intentional torts."[57] Addressing Congress' rationale, the author reprises one, that "exposing the public fisc to potential liability . . . would be 'dangerous,' based on the notion that these torts are both easy for plaintiffs to exaggerate and difficult to defend against."[58]

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[54] Rebecca L. Andrews, *So the Army Hired an Ax-Murderer: The Assault and Battery Exception to the Federal Tort Claims Act Does Not Bar Suits for Negligent Hiring, Retention and Supervision*, 78 Wash. L. Rev. 161, 170 (2003).

[55] David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. St. Thomas L.J. 375, 377 (2011).

[56] *Id.* at 378.

[57] *Id.* at 379.

[58] *Id.* at 384.

But the author also discerns two new rationales. He suggests that Congress "took a 'wait and see' or 'step by step' approach."[59] Finally, a "theme that emerges is the assumption that [excluded claims] could and would be 'settled on the basis of private acts.'"[60]

From this exposition, a clear rationale emerges. Congress was willing to waive sovereign immunity where its employees acted negligently but not where they acted deliberately or recklessly—at least as to the specified torts. This is reminiscent of the intentional acts exclusion under a standard liability policy: an insurer is willing to insure against damages incurred in an accident, but it is against public policy to insure against liability for intentional actions.[61] Declining to waive immunity for the specified intentional torts promotes high standards of performance by a sovereign's employees and avoids "dangerous" exposure of the public treasury. This approach rejects relying solely on the claimant's perspective (having been run over by a truck). We have examined the legislative history of the State Tort Claims Act and find nothing addressing the exceptions to the general waiver of sovereign immunity.[62] Evidently, the Legislature was satisfied to rely upon Congress' example.

Because waiver of sovereign immunity is a matter addressed solely to the Legislature and we are required to strictly construe the statute against a waiver, we would be acting beyond our power to do otherwise. Thus, in considering the arguments advanced by the parents, we must determine only whether

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[59] *Id.*

[60] *Id.* at 385.

[61] See *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001).

[62] See, Introducer's Statement of Purpose, L.B. 154, Judiciary Committee, 80th Leg., 1st Sess. (Feb. 3, 1969); Minutes of Committee on Judiciary, L.B. 154, 80th Leg., 1st Sess. (Feb. 3, 1969); Committee Statement, L.B. 154, Judiciary Committee, 80th Leg., 1st Sess. (Feb. 6, 1969); Floor Debate, L.B. 154, 80th Leg., 1st Sess. 840-43 (Mar. 26, 1969).

immunity has clearly been waived. If there is any doubt, the State must prevail.

(e) Misrepresentation in Law of Torts

We concede that misrepresentation permeates the law of torts. It can be a separate tort or a method of accomplishing other torts.

Recognizing that misrepresentation can be a broad topic, a treatise limited the scope of its discussion. Its chapter on misrepresentation related to "the extent to which tort actions are available to protect intangible economic interests of those who are induced by mistake to enter into bargaining transactions as a consequence of a fraud of misrepresentation of others."[63] The treatise touched on the narrower tort of deceit:

> The tort action of deceit is sometimes used as the name of the tort for covering all kinds of actions now available for all kinds of so-called actionable misrepresentations or nondisclosure. Sometimes that term is more narrowly used to cover the tort remedy that was available under the common law and prior to recent developments. But the more important question relates to the extent of liability on any theory for misrepresentations and nondisclosures. The reasons for the separate development of this action, and for its peculiar limitations, are in part historical, and in part connected with the fact that *in the great majority of the cases which have come before the courts the misrepresentations have been made in the course of a bargaining transaction between the parties. Consequently, the action has been colored to a considerable extent by the ethics of bargaining between distrustful adversaries. Its separate recognition has been confined in practice very largely to the invasion of interests of a financial or commercial character,*

[63] See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 105 at 726 (5th ed. 1984).

> *in the course of business dealings. There is no essential reason to prevent a deceit action from being maintained, for intentional misstatements at least, where other types of interests are invaded; and there are a few cases in which it has been held to lie for personal injuries*, for tricking the plaintiff into an invalid marriage or marriage with one who is physically unfit, or for inducing the plaintiff to leave a husband, or to incur criminal penalties. In general, however, other theories of action have been sufficient to deal with non-pecuniary damage, and the somewhat narrower theory of deceit is not called into question.[64]

Case law has made clear that the misrepresentation exception applies to negligent misrepresentation as well as willful misrepresentation. Two U.S. Supreme Court cases, *United States v. Neustadt*[65] and *Block v. Neal*,[66] so held under the FTCA. The *Neustadt* Court reasoned:

> To say . . . that a claim arises out of "negligence," rather than "misrepresentation," when the loss suffered by the injured party is caused by the breach of a "specific duty" owed by the Government to him, *i. e.*, the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs, is only to state the traditional and commonly understood legal definition of the tort of "negligent misrepresentation," as is clearly, if not conclusively, shown by the authorities set forth in the margin, and which there is every reason to believe Congress had in mind when it placed the word "misrepresentation" before the word "deceit" in § 2680(h). As the Second Circuit observed . . . , "deceit" alone

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[64] *Id.* (emphasis supplied).

[65] *United States v. Neustadt*, 366 U.S. 696, 81 S. Ct. 1294, 6 L. Ed. 2d 614 (1961).

[66] *Block v. Neal*, 460 U.S. 289, 103 S. Ct. 1089, 75 L. Ed. 2d 67 (1983).

> would have been sufficient had Congress intended only to except deliberately false representations. Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending "some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment." . . . Moreover, as we have said in considering other aspects of the Act: "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."[67]

The *Block* Court declared that "the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies."[68]

We have similarly held in a case construing the misrepresentation exception under the Political Subdivisions Tort Claims Act.[69] In *Stonacek v. City of Lincoln*, homeowners built in an area near a tributary of a stream. After they experienced flooding in their new homes, they sued the city. Among other things, the complaint alleged that the city was negligent in failing to advise the homeowners of the Department of Natural Resources' study which showed the flood elevation of the property was different from the elevation disclosed by the city. The city alleged that this was a claim for misrepresentation and that it had sovereign immunity because the Political Subdivisions Tort Claims Act excepted such a claim from the waiver of immunity.[70] We employed the reasoning from *Neustadt* and explained:

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[67] *United States v. Neustadt, supra* note 65, 366 U.S. at 706-08 (citations omitted).

[68] *Block v. Neal, supra* note 66, 460 U.S. at 296.

[69] See *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

[70] See Neb. Rev. Stat. § 13-910(7) (Reissue 2012).

> In addressing the claims in *Neustadt*, the U.S. Supreme Court observed that the federal misrepresentation exception insulates the government against liability for conveying false or inaccurate information, *whether that information was conveyed based on willfull or negligent misrepresentation.* In determining that the [FTCA] excepts acts of misrepresentation, the Supreme Court defined negligent misrepresentation as the breach of "the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs." . . . *It has been observed that the "prophylaxis of the misrepresentation exception extends to failures of communication*."[71]

We determined that the homeowners' claim was based on misrepresentation. We noted that the homeowners alleged the city had "failed to properly advise them of information."[72] But we held that the gravamen of the claim "involves the improper communicating of the flood plan information" and that, thus, "the claim [was] based on a misrepresentation."[73] Because the claim fell within the misrepresentation exception, we concluded that the claim was barred because sovereign immunity was not waived.

The reasoning of *Stonacek* is equally applicable to a claim implicating the misrepresentation exception under the State Tort Claims Act. The misrepresentation exception under § 13-910(7) is identical to the misrepresentation exception contained in § 81-8,219(4).

Having provided a brief background concerning misrepresentation, we turn to the parents' arguments.

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[71] *Stonacek v. City of Lincoln, supra* note 69, 279 Neb. at 883-84, 782 N.W.2d at 911 (emphasis supplied).

[72] *Id.* at 885, 782 N.W.2d at 912.

[73] *Id.*

(f) Parents' Arguments

The parents assert that the district court erred in applying the misrepresentation exception for several reasons. We address each in turn.

*(i) Application to Misrepresentation Involving Physical Injury*

First, the parents claim that the traditional tort of misrepresentation requires some form of pecuniary loss and that the exception was designed to cover only that form of tort. The parents argue that because they did not plead any element of pecuniary loss, it was error to find their claim barred under the exception for misrepresentation or deceit. In essence, their argument is that Nebraska would not recognize a cause of action in tort for a conscious misrepresentation involving a risk of physical harm. We disagree.

Whether the misrepresentation exception applies where there is no commercial misrepresentation and the loss suffered is physical harm is a question of first impression in Nebraska. Our previous cases dealing with the exception all involved compensation for an economic loss.[74] In *Tolliver v. Visiting Nurse Assn.*,[75] we stated: "[T]he distinct tort of fraud or misrepresentation is *generally* an economic tort against financial interests, asserted to recover pecuniary loss. One who makes a fraudulent or negligent misrepresentation in a business transaction is *normally* liable only for the recipient's pecuniary losses." *Tolliver* involved a claim for nonpecuniary and noneconomic loss (pain and suffering), but it did not concern the misrepresentation exception.

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[74] See, *Zawaideh v. Nebraska Dept. of Health & Human Servs., supra* note 39; *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Stonacek v. City of Lincoln*, *supra* note 69; *Wickersham v. State, supra* note 38.

[75] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 539, 771 N.W.2d 908, 914-15 (2009) (emphasis supplied).

*Tolliver* does not foreclose the possibility of noneconomic damages in a tort action for misrepresentation. We note that our language, quoted above with our emphasis supplied, spoke in terms of generalities and not absolutes. And we provided two reasons why we did not believe permitting damages for pain and suffering was appropriate under a misrepresentation theory in that case. First, we recognized that all of the damages that the plaintiffs sought under their misrepresentation claims were alleged under their negligence claim. We cited a treatise to the effect that it was usually unnecessary to resort to a theory of deceit, because other theories of action were sufficient to deal with nonpecuniary loss.[76] Second, we stated that a party may not have double recovery for a single injury. Although the plaintiffs did not specifically allege pain and suffering damages for their misrepresentation claims, we stated that such damages would have duplicated the pain and suffering damages claimed under the negligence cause of action. Thus, under the facts of *Tolliver*, it was not necessary for us to decide whether noneconomic damages would be available for a misrepresentation claim.

In *Tolliver*, we focused on two sections of the Restatement.[77] Section 525 involves fraudulent misrepresentation that causes economic harm, and it is found in a chapter of the Restatement "concerned only with the liability for pecuniary loss resulting from misrepresentation or nondisclosure."[78] But the Restatement sets forth another type of fraudulent misrepresentation—one that causes physical harm.[79] *Tolliver* did not mention § 310. We will discuss § 310 in more detail later in the analysis.

Because, as we have already explained, our State Tort Claims Act was modeled on the FTCA, we look to federal law

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[76] See Keeton et al., *supra* note 63.

[77] Restatement (Second) of Torts §§ 525 and 557A (1977).

[78] *Id.*, ch. 22, scope note at 55.

[79] See Restatement (Second) of Torts § 310 (1965).

for guidance. The federal courts, however, are not uniform in their application of the misrepresentation exception.

The two key U.S. Supreme Court cases dealing with the misrepresentation exception to the FTCA do not directly answer the question. Both *Neustadt*[80] and *Block*[81] involved economic damages in connection with the purchase of residential property.

Footnotes contained in the *Neustadt* and *Block* opinions have perhaps created confusion about the applicability of the misrepresentation exception to noncommercial situations. A footnote in *Neustadt* stated:

> Our conclusion neither conflicts with nor impairs the authority of *Indian Towing Co. v. United States*, 350 U. S. 61[, 76 S. Ct. 122, 100 L. Ed. 48 (1955)], which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not "arise out of . . . misrepresentation," any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "(s)o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."[82]

The *Block* Court, in discussing the above footnote from *Neustadt*, said the following in a footnote:

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[80] *United States v. Neustadt, supra* note 65.

[81] *Block v. Neal, supra* note 66.

[82] *United States v. Neustadt, supra* note 65, 366 U.S. at 711 n.26.

> The Court distinguished negligent misrepresentation from the "many familiar forms of negligent misconduct [which] may be said to involve an element of 'misrepresentation,' [only] in the generic sense of that word." . . . The "misrepresentation" exception applies only when the action itself falls within the commonly understood definition of a misrepresentation claim, which "'has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.'" . . . Thus, the claim in *Indian Towing Co. v. United States*, 350 U. S. 61[, 76 S. Ct. 122, 100 L. Ed. 48] (1955), for damages to a vessel which ran aground due to the Coast Guard's alleged negligence in maintaining a lighthouse, did not "aris[e] out of . . . misrepresentation" within the meaning of § 2680(h).[83]

These footnotes referencing *Indian Towing Co. v. United States*[84] may have been an attempt to distinguish misrepresentation from operational negligence.

The lower federal courts have inconsistent results.

Two federal circuit courts have limited application of the misrepresentation exception to pecuniary or commercial misrepresentations. The 10th Circuit concluded that the misrepresentation exception to the FTCA did not apply to bar emotional distress claims.[85] The court observed that pecuniary loss, which it called an "essential component[] of negligent misrepresentation,"[86] was not present. The 11th Circuit determined that the misrepresentation exception applied in a case where the injury suffered "was the loss of . . . investment

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[83] *Block v. Neal, supra* note 66, 460 U.S. at 296 n.5.

[84] *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

[85] *Estate of Trentadue ex rel. Aguilar v. U.S.*, 397 F.3d 840 (10th Cir. 2005).

[86] *Id.* at 855.

money, which is an economic injury arising from a commercial decision."[87] And some federal district courts noted the presence or absence of a commercial misrepresentation in either applying or declining to apply the exception.[88]

But two other circuit courts have contradictory aspects. In *Kohn v. United States*,[89] an action involving the claims of parents of a soldier who was killed by a fellow soldier, the Second Circuit briefly addressed the misrepresentation and deceit exceptions. The court stated: "[T]hese exceptions have generally been applied only to actions for damages due to commercial decisions that were predicated on incorrect or incomplete information. . . . Because the context here is hardly commercial in nature, we do not believe that appellants' claims are necessarily barred as an action for misrepresentation or deceit."[90] But the Second Circuit later observed a limitation of *Kohn*: "*Kohn* stopped well short of holding that the United States had waived sovereign immunity for non-commercial torts arising from its suppression of information or its release of information that was fraudulent. Indeed, the panel in *Kohn* had no occasion to decide that question,"[91] because the Second Circuit reversed and remanded to permit the appellants to amend their remaining cause of action to include new allegations. The Ninth Circuit first stated that

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[87] *Zelaya v. U.S.*, 781 F.3d 1315, 1338 (11th Cir. 2015).

[88] See, e.g., *Ard v. F.D.I.C.*, 770 F. Supp. 2d 1029 (C.D. Cal. 2011) (stating government is not liable for injuries resulting from commercial decisions made in reliance on government misrepresentations); *Mill Creek Group, Inc. v. F.D.I.C.*, 136 F. Supp. 2d 36 (D. Conn. 2001) (observing that plaintiff sought to redress economic injury incurred in commercial setting); *Salter v. U.S.*, 853 F. Supp. 389, 394 (M.D. Ala. 1994) (stating exception did not apply because plaintiff's claim "is for personal injury, not for injury of a commercial or financial nature").

[89] *Kohn v. United States*, 680 F.2d 922 (2d Cir. 1982).

[90] *Id.* at 926.

[91] See *Cabiri v. Government of Republic of Ghana*, 165 F.3d 193, 201 (2d Cir. 1999).

"the misrepresentation exception precludes liability where the plaintiff suffers economic loss as a result of a commercial decision which was based on a misrepresentation."[92] But it later stated, without any analysis, that the misrepresentation exception barred a claim by a juvenile who was sexually abused by a felon working at a foster home.[93]

Several federal district courts have explicitly stated that the exception is not limited to financial or commercial loss.[94] In *Najbar v. U.S.*,[95] a Minnesota federal court addressed the footnote from *Block* that we quoted above:

> Taken out of context, the quoted portions of *Block* and *Neustadt* could be read to support [plaintiff's] assertion that, because she does not seek to recover for commercial injury, her claim is not barred by the FTCA's misrepresentation exception even if it is a claim for misrepresentation. But the context makes clear that *Block* and *Neustadt* were simply describing, in elliptical fashion, the most-common types of misrepresentation claims. Indeed, the very language from Prosser's treatise quoted in *Neustadt* and then in *Block* spoke of misrepresentation claims being "'very largely'"—but not exclusively—limited to claims seeking recovery for commercial injury. . . . And *Block* itself said that "the essence of an action for misrepresentation,

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[92] *Green v. United States*, 629 F.2d 581, 584 (9th Cir. 1980). See, also, *Mt. Homes, Inc. v. U.S.*, 912 F.2d 352, 356 (9th Cir. 1990) (stating conclusion that misrepresentation exception precluded recovery was "buttressed by the fact that [plaintiff] suffered an economic injury in a commercial setting").

[93] See *Lawrence v. U.S.*, 340 F.3d 952 (9th Cir. 2003).

[94] See, e.g., *Najbar v. U.S.*, 723 F. Supp. 2d 1132 (D. Minn. 2010), *affirmed on other grounds* 649 F.3d 868 (8th Cir. 2011); *Russ v. U.S.*, 129 F. Supp. 2d 905 (M.D.N.C. 2001); *Mullens v. U.S.*, 785 F. Supp. 216 (D. Maine 1992); *Wells v. U.S.*, 655 F. Supp. 715 (D.D.C. 1987); *Diaz Castro v. United States*, 451 F. Supp. 959 (D. Puerto Rico 1978); *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 181 (E.D. Tenn. 1977).

[95] *Najbar v. U.S., supra* note 94, 723 F. Supp. 2d at 1137.

> whether negligent or intentional, is the communication of misinformation on which the recipient relies." . . . This formulation of the "essence" of misrepresentation is not limited to commercial misrepresentations. Finally, neither *Neustadt* nor *Block* involved a claim for noncommercial misrepresentation, and thus neither case could have held that such claims were outside the scope of the FTCA's misrepresentation exception.

The Minnesota federal court remarked that "Congress used the word 'misrepresentation,' and that word is broad enough to reach all types of claims for misrepresentation, whether those claims seek recovery for commercial injury, physical injury, or emotional injury."[96] A different court looked to a few cases that had applied the misrepresentation exception and concluded that "[c]learly the exception is just as applicable to actions involving personal injury and wrongful death as it is to those involving only financial or commercial loss, absent any indication that Congress intended such exception to apply only to the latter type of lawsuits."[97] Another court rejected the plaintiff's argument that the misrepresentation exception had been limited to transactions of a commercial nature, observing that the *Neustadt* Court relied upon cases which were noncommercial.[98]

Some federal courts have applied the misrepresentation exception to claims involving nonpecuniary losses without elaboration. At least one federal court excluded a claim seeking damages for wrongful death.[99] We observe that in some cases in which claims for personal injuries were barred, the claims appeared to arise out of a commercial

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[96] *Id.*

[97] *Diaz Castro v. United States, supra* note 94, 451 F. Supp. at 963.

[98] *Vaughn v. United States*, 259 F. Supp. 286 (N.D. Miss. 1966).

[99] See, e.g., *Bartie v. United States*, 216 F. Supp. 10 (W.D. La. 1963) (alleging government failed to give adequate warning concerning hurricane).

transaction.[100] And we note that the Seventh Circuit has stated that "[t]he test is not whether the injury was economic, but whether it resulted from a commercial decision based on a governmental misrepresentation."[101]

Decisions from courts of two states deserve attention. First, California courts have found that its statutes[102] do not insulate the government from liability when the suit did not involve commercial misrepresentations. In *Johnson v. State of California*,[103] foster parents sued after a child, who the state was aware had homicidal tendencies, was placed in their home without notice of any dangerous propensities. The court reasoned that "it would be at best anomalous, and at worst an inversion of accepted priorities, to allow the state immunity only upon a finding that the parole officer actually lied to plaintiff."[104]

But this decision provides little guidance for several reasons, in increasing order of importance. Most of the decision focused on the discretionary function exception. California's statute is considerably different from ours. California expansively shields state employees from individual liability, but

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[100] See, e.g., *Schneider v. USA*, 936 F.2d 956 (7th Cir. 1991) (purchasers of defective prefabricated homes sued for personal injuries and property damages); *Hamre v. United States*, 799 F.2d 455 (8th Cir. 1986) (purchasers of home discovered to be infested with bats sued for personal injuries and property damages).

[101] *Preston v. United States*, 596 F.2d 232, 239 (7th Cir. 1979).

[102] See Cal. Gov't Code §§ 818.8 ("public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional") and 822.2 ("public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice") (West 2012).

[103] *Johnson v. State of California*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

[104] *Id.* at 800, 447 P.2d at 364, 73 Cal. Rptr. at 252.

our statute does so only where suit *is* permitted under the State Tort Claims Act.[105] The California court relied heavily on state legislative history demonstrating a concern with misrepresentation in the area of state contracts. But, most important, the court does not follow a rule construing waivers of sovereign immunity strictly against waiver and in favor of the sovereign. The phrase "strict construction" does not appear anywhere in the decision. The court's concern with an "inversion of accepted priorities" attacks the central premise of an intentional torts exception. From a moral standpoint, intentional torts *are* more egregious than mere negligence. But the Legislature, and not the courts, is empowered to determine where immunity should be waived. We might not agree with the rationale for its distinction, but we must not usurp its role in drawing the line between liability and immunity. Because a California Court of Appeals decision[106] is driven by the *Johnson* opinion, the same reasons dictate giving it little attention.

A decision of the Supreme Court of Alaska[107] deserves more attention, because Alaska's statute, like ours, was modeled on the FTCA. In the Alaska case, parents sued the state, alleging negligent failure to disclose information that would have alerted them to the risks of accepting into their home a foster child who ultimately physically and sexually assaulted their two children. The Supreme Court of Alaska reversed a summary judgment in favor of the state.

But despite the similarity of statutes, we do not find the Alaska decision to be persuasive. Most of the decision focused on foreseeability in the context of summary judgment. The court's examination of federal cases was limited to the *Neustadt* footnote.[108] The court relied heavily upon

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[105] See § 81-8,217.

[106] *Michael J. v. L.A. Cty. D. of Adoptions*, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504 (1988).

[107] *P.G. v. DFYS*, 4 P.3d 326 (Alaska 2000).

[108] *United States v. Neustadt, supra* note 65.

the California court's reasoning in *Johnson*. Likewise, the Alaska court does not discuss "strict construction" and fails to discern the rationale that could induce a state legislature to retain sovereign immunity for some torts while waiving it for others.

Although we have not expressly adopted § 310 of the Restatement,[109] it is persuasive authority that a cause of action would lie for a conscious misrepresentation involving risk of physical harm. It states:

> An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor
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> (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and
>
> (b) knows
>
> (i) that the statement is false, or
>
> (ii) that he has not the knowledge which he professes.[110]

This section fits the facts determined by the district court. Gall was the "actor who ma[de] a misrepresentation." The parents were the "third person[s]." Their child was the "other." Thus, Gall is subject to liability to the parents' child which resulted from the act done by the parents (taking K.D.M. into their home) in reliance upon the truth of the representation, because Gall intended to induce the parents, or should have realized that her misrepresentation was likely to induce action by the parents, which involved an unreasonable risk of physical harm to the parents' child, and Gall knew that the statement was false. This section is found in a division of the Restatement on negligence, so it is no surprise a comment stated that the liability in § 310 "is negligence liability and is enforced in an

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[109] Restatement, *supra* note 79.

[110] *Id.* at 103.

ordinary negligence action."[111] What is important is that § 310 is located in a section of the Restatement that is not limited to commercial or business transactions and expressly extends to liability for physical harm.

[14] We agree with those courts finding that the misrepresentation exception can apply to claims for personal injuries as well as economic injuries and to claims not involving business transactions. We are persuaded by the reasoning of *Najbar v. U.S.*[112] As that court observed, while the U.S. Supreme Court has explicitly recognized that the misrepresentation exception would arise most often in the course of business transactions,[113] the Court has not declared that the exception is applicable only in the commercial context. And § 310 of the Restatement provides persuasive authority that conscious misrepresentation can be the basis for liability for physical harm.

[15] The doctrine of strict construction supports our conclusion that the misrepresentation exception applies in a case such as this one. As we explained earlier, statutes purporting to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver, and a waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.[114] Thus, the misrepresentation exception must be strictly construed in favor of the government.[115] In doing so, we cannot eliminate its application to a claim—the "essence" of which "is the communication of misinformation on which the recipient relies"[116]—merely because the claim does not involve pecuniary loss or

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[111] Restatement, *supra* note 77, § 557A, comment *a.* at 149.

[112] *Najbar v. U.S., supra* note 94.

[113] See *United States v. Neustadt, supra* note 65.

[114] See *Lamb v. Fraternal Order of Police Lodge No. 36, supra* note 31.

[115] See *Zelaya v. U.S., supra* note 87.

[116] *Block v. Neal, supra* note 66, 460 U.S. at 296.

a financial transaction. If the Legislature wishes to expand the scope of the State's liability by limiting application of the misrepresentation exception to claims arising from commercial transactions or which involve only pecuniary losses, it has the power to amend the statute accordingly.

*(ii) Gravamen of Complaint Test*

Next, the parents contend that the gravamen of the complaint test is inapplicable. In arguing that the test is not appropriate in a case for personal injury, the parents repeat their contention that misrepresentation as a tort involves pecuniary or commercial loss only. Again, we disagree.

The gravamen of the parents' allegations of negligence was the communication of misinformation. Had the State, through Gall, not provided the parents with false information, the parents' child would not have been harmed (because either they would not have accepted K.D.M. in their home or they would have implemented appropriate safeguards). Under the reasoning of *Stonacek*,[117] it is immaterial whether Gall negligently failed to disclose or warn of K.D.M.'s sexual history or whether Gall intentionally concealed that sexual history. In *Stonacek*, we held that a claim for failure to communicate relevant information was barred by the misrepresentation exception. Here, the parents' allegations of "failure to warn" and "failure to disclose" essentially assert a failure to communicate critical information. And as in *Stonacek*, those claims, no matter how pled, are claims of misrepresentation. This is not a case where the cause of action only collaterally involves a misrepresentation; rather, the cause of action arises out of and is grounded on misrepresentation.

*(iii) Independent Operational Duty to Disclose*

The parents argue that it was error to find their claim barred by the misrepresentation exception, because they assert that

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[117] *Stonacek v. City of Lincoln, supra* note 69.

the State had an independent operational duty to disclose K.D.M.'s sexual history. A governmental entity "'is liable for injuries resulting from negligence in performance of operational tasks even though misrepresentations are collaterally involved.'"[118] But again, we look to *Stonacek* and the gravamen of the complaint.

In *Stonacek*, we addressed whether the failure to disclose could fall outside the misrepresentation exception because it alleged negligent performance of operational tasks. In doing so, we cited and discussed the decisions in *Neustadt* and *Block*. In *Neustadt*, the plaintiff claimed it suffered money damages as a result of an erroneous appraisal conducted by a government agency. The U.S. Supreme Court found the erroneous appraisal was a misrepresentation, and thus, the claim was barred by sovereign immunity. In *Block*, the plaintiff alleged it suffered money damages when a government agency breached a duty to supervise construction of a new home. The *Block* Court noted that although part of the theory was that the government agency failed to communicate information about the construction, the plaintiff also alleged the agency had a separate duty to act by supervising the construction. Because it was the failure to supervise that caused the harm, the *Block* Court concluded the claim was not barred by the misrepresentation exception.

Where the gravamen of the complaint is negligent performance of operational tasks rather than misrepresentation, the State cannot rely upon the misrepresentation exception in the State Tort Claims Act.[119] The misrepresentation exception "does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty."[120] But to avoid dismissal based on the misrepresentation

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[118] *Zelaya v. U.S., supra* note 87, 781 F.3d at 1336.

[119] *Stonacek v. City of Lincoln, supra* note 69.

[120] *Block v. Neal, supra* note 66, 460 U.S. at 297.

exception, a plaintiff must allege injury independent of that caused by the erroneous information.[121]

Even though the State had a duty to warn of K.D.M.'s sexual history, the facts of this case fall within the misrepresentation exception. As *Neustadt*, *Block*, and *Stonacek* make clear, to fall outside the scope of the misrepresentation exception, the question is not whether the government had an independent duty to take action; rather, the question is whether the duty on which a plaintiff bases his or her claim is a duty separate and apart from the duty to disclose information. Here, the complaint alleged that Jill "inquired whether there was anything sexual in [K.D.M.'s] record, [and] Gall stated 'no.'" The parents claim that Gall "knew or should have known of [K.D.M.'s record of sexual abuse] but refused to disclose such information." Their complaint focuses on the failure to disclose the information, but the essence of the claim is the breach of a duty not to miscommunicate. And they have not alleged injury independent of that caused by the erroneous information. Any operational duty to disclose information or to warn the parents about K.D.M.'s sexual history is subsumed by the misrepresentation exception.

The parents rely upon our decision in *Fuhrman v. State*,[122] arguing that both cases rest on the complete failure to convey information. In *Fuhrman*, the Department of Health and Human Services was aware that one of its wards had a history of physical violence against his caregivers and others. But a department employee did not tell anyone at the hospital where the ward was taken about the ward's violent history or that the ward was likely to target female staff members. At the hospital, the ward attacked a female psychiatric technician. The technician sued, claiming that appellants were negligent in failing to disclose to the hospital and its employees information regarding the ward's assaultive behavior. Near the close

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[121] See *Stonacek v. City of Lincoln, supra* note 69.

[122] *Fuhrman v. State, supra* note 4.

of trial, appellants moved for leave to amend their answer to include affirmative defenses of sovereign and qualified immunity, based on their understanding that the technician was asserting that appellants had misrepresented the ward's medical history. The district court denied the motion, and we found no abuse of discretion.

*Fuhrman* is distinguishable. The affirmative defense of sovereign immunity was not pled in an answer prior to trial. We considered it only in the context of whether the trial court abused its discretion in denying a motion to amend the answer—made near the end of trial—to include the defense. Here, the State asserted the defense in its operative answer.

[16] Further, *Fuhrman* contains language that is irreconcilable with *Stonacek*. In *Fuhrman*, we stated that "neither [the technician's] theory of the case nor her evidence was based on misrepresentation, but, rather, on a complete failure to convey the critical information, without an inference that this was deliberately done."[123] We noted that the trial court's decision was "based on failure to disclose information."[124] However, *Stonacek* clearly holds that an allegation of failure to advise was a claim based on misrepresentation. Our opinion in *Stonacek* did not discuss or cite *Fuhrman*, but the two cases are in conflict. Because we are persuaded by the reasoning of *Stonacek*, we expressly disapprove of *Fuhrman* to the extent it holds that "a complete failure to convey the critical information, without an inference that this was deliberately done,"[125] falls outside the misrepresentation exception.

[17] No matter how the parents try to frame their complaint, their claim arises out of a misrepresentation. As the 11th Circuit has stated: "'It is the substance of the claim and not the language used in stating it which controls' whether the claim is barred by an FTCA exception. . . . Thus, a plaintiff

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[123] *Id.* at 183, 655 N.W.2d at 873.

[124] *Id.*

[125] *Id.*

cannot circumvent the misrepresentation exception simply through artful pleading of its claims."[126] Gall's misstatement is essential to the parents' claim. Although they frame their claim as a negligence action, the basis for it is Gall's underlying misrepresentation.

*(iv) Public Policy*

The parents assert that the State should not be immune from liability for failing to properly disclose the history of an adoptee to potential parents as a matter of public policy. But such policy judgments are properly within the province of the Legislature, not this court.

4. Negligent Supervision

The parents argue that the district court erred in failing to find the State liable for negligent supervision. They contend that the evidence clearly established that Gall was overworked and that her supervisor was responsible for Gall's workload.

Recasting an excepted tort claim as a negligence claim does not avoid the bar of immunity. In *Johnson v. State*,[127] we determined that a negligence claim asserting failure to supervise, hire, and discipline was barred because it arose out of assault and battery. In that case, we adopted the reasoning of four of the eight participating justices in a U.S. Supreme Court case,[128] who stated:

> "[The plaintiff] cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like [the

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[126] *JBP Acquistions, LP v. U.S. ex rel. F.D.I.C.*, 224 F.3d 1260, 1264 (11th Cir. 2000).

[127] *Johnson v. State, supra* note 15.

[128] *United States v. Shearer, supra* note 53.

> plaintiff's] that sound in negligence but stem from a battery committed by a Government employee."[129]

We also agreed with a justice's concurrence in a different U.S. Supreme Court case:

> "To determine whether a claim arises from an intentional assault or battery and is therefore barred by the exception, a court must ascertain whether the alleged negligence was the breach of a duty to select or supervise the employee-tortfeasor or the breach of some separate duty independent from the employment relation. . . . If the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception . . . bars the claim. Otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors. To allow such claims would frustrate the purposes of the exception."[130]

The same principle applies here. The parents' negligent supervision claim is barred, because it arises out of misrepresentation. Any alleged negligence was inextricably linked to the misrepresentation. The district court did not err by failing to find the State liable for negligent supervision, because this claim was also barred by the State Tort Claims Act.

## VI. CONCLUSION

The Legislature may wish to consider whether the rationale underlying the intentional torts exception, at least as to misrepresentation and deceit, continues to justify preservation of the State's sovereign immunity. From the perspective of the

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[129] *Johnson v. State, supra* note 15, 270 Neb. at 320, 700 N.W.2d at 624 (emphasis in original).

[130] *Id.* at 322, 700 N.W.2d at 625, quoting *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988) (Kennedy, J., concurring in judgment).

parents, immunity "adds insult to injury." Their child was the one, so to speak, "run over by the truck." And it may well be that time has demonstrated that Congress' fears—of the difficulty of defending such suits and the probability of judgments against the government in amounts out of proportion to the damages actually suffered by claimants—have proved unfounded. It may be time for the "next step" envisioned by the commentator. But it is absolutely clear that those questions are properly addressed to the Legislature and not to us. And we express no opinion whether the parents have any avenue to compensation through legislative action.

We must strictly construe the misrepresentation exception to the waiver of sovereign immunity in favor of the State and conclude that so construed, it cannot be definitively limited to claims involving pecuniary losses.

Because the parents' claims arise out of Gall's misrepresentation, they are barred. We affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
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# State of Nebraska, appellee, v. Buoy P. Gach, appellant.

898 N.W.2d 360

Filed June 30, 2017. No. S-16-156.

1. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
2. **Pleas: Convictions.** Failure to give all or part of the advisement required by Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2016) regarding the immigration consequences of a guilty or nolo contendere plea is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 29-1819.02(2).
3. **Pleas: Convictions: Claims: Proof.** To state a cognizable claim for relief under Neb. Rev. Stat. § 29-1819.02(2) (Reissue 2016), the defendant must allege and show that (1) the trial court failed to give all or part of the advisement contained in § 29-1819.02(1) and (2) the defendant faces an immigration consequence that was not included in the advisement given. It is the defendant's burden to establish these factors by clear and convincing evidence.
4. **Pleas: Convictions: Notice: Proof.** The second factor of the test announced in *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009), assumes the court's advisement, as given, was incomplete or noncompliant and requires a defendant to show he or she faces an immigration consequence that was not included in the advisement actually given. When considering the second factor, two questions must be answered: What immigration consequences is the defendant actually facing, and What immigration consequences were actually communicated to the defendant in the advisement as given?
5. **Pleas: Convictions: Extradition and Detainer.** When the Department of Homeland Security places an immigration detainer on an individual, that person actually faces immigration consequences sufficient to claim the protections of Neb. Rev. Stat. § 29-1819.02 (Reissue 2016).

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Peder Bartling, of Bartling Law Offices, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

Buoy P. Gach moved to vacate his conviction and withdraw his plea, claiming the District Court for Douglas County failed to properly advise him of the immigration consequences of conviction before accepting his plea of no contest.[1] The district court denied the motion, and Gach appeals. Finding no abuse of discretion, we affirm.

## FACTS

On August 5, 2009, Gach was charged with two counts of assault in the first degree[2] and with two counts of use of a deadly weapon to commit a felony.[3] The charges stemmed from events that occurred on July 3, when Gach and another individual fired a gun into a group of people standing on a porch and two people were seriously injured.

## Plea

A plea agreement was reached, and on January 11, 2010, Gach entered a plea of no contest to one count of assault in the first degree. The remaining charges were dismissed. The record from the change-of-plea hearing reflects the following colloquy between the court, the State, and Gach:

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[1] See Neb. Rev. Stat. § 29-1819.02 (Reissue 2016).

[2] See Neb. Rev. Stat. § 28-308 (Reissue 2016).

[3] See Neb. Rev. Stat. § 28-1205 (Reissue 2016).

> THE COURT: Now, [Gach], before I can accept your plea of no contest I have to be certain that there are facts that support your plea of no contest.
>
> [Deputy county attorney], if you could please set forth the factual basis.
>
> [Deputy county attorney]: Your Honor, before I give the factual basis I just remind the Court that perhaps before [Gach] entered the plea you could do the immigration advisory, of any potential impact on that. Would you like me to do that or would you like to do the —
>
> THE COURT: Let me do that right now, sir. In addition to the penalty of 1 to 50 years' imprisonment, 50 being the max, one year being the minimum, your immigration status with the United States could be affected. Do you understand that, sir?
>
> [Gach]: (No response.)
>
> THE COURT: In other words — do you understand that?
>
> [Gach]: Yes.
>
> THE COURT: In other words, you could be deported . . . . Do you understand that?
>
> [Gach]: Yes.

At the conclusion of the plea hearing, the court accepted Gach's plea and found him guilty of assault in the first degree. On April 1, Gach was sentenced to imprisonment for a term of 10 to 20 years.

### Motion to Withdraw Plea

On November 19, 2014, Gach filed a pro se motion to vacate his conviction and withdraw his plea pursuant to § 29-1819.02(2), claiming he was not given the proper immigration advisement during his plea hearing. The court appointed counsel for Gach and set the matter for an evidentiary hearing.

At the hearing, the State and Gach stipulated to several facts which we summarize here:

- The District Court for Douglas County did not provide Gach the verbatim advisement contained in § 29-1819.02(1);
- Gach is not a U.S. citizen and was not a U.S. citizen at the time he entered his no contest plea;
- On April 14, 2010, the U.S. Immigration and Customs Enforcement Service's detention and removal section filed an "Immigration Detainer — Notice of Action" with the Department of Correctional Services (DCS) that required DCS to "detain [Gach] to provide adequate time for [the Department of Homeland Security] to assume [his] custody" in order to "determine whether [he] is subject to removal from the United States";
- DCS identified Gach's "'Projected Release Date'" as August 3, 2019; and
- DCS had the immigration detainer on file and intended to hold Gach on behalf of the U.S. Immigration and Customs Enforcement Service at the conclusion of his sentence.

During the hearing, all parties agreed that the applicable legal standard was announced by this court in *State v. Yos-Chiguil*.[4] In that case, we held that to state a cognizable claim for relief under § 29-1819.02(2), the defendant must allege and show that (1) the trial court failed to give all or part of the advisement contained in § 29-1819.02(1) and (2) the defendant faces an immigration consequence that was not included in the advisement given.

The district court overruled Gach's motion in an order entered January 14, 2016. With respect to the first prong of the *Yos-Chiguil* test, the court acknowledged its failure to comply with § 29-1819.02, stating:

> [T]he Court did not give the exact verbatim advisement to [Gach]. In hindsight, it would have been more prudent for the Court to have given the verbatim advisement. . . . The Court did advise [Gach] that conviction of the offense could affect his immigration status and that he could be deported. The Court did not advise him that

[4] *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

> this only affects him if he is not a United States citizen, and rather than use the word "removal", the Court used the word "deported".

The court went on to consider whether Gach was facing immigration consequences that were not included in the advisement as given, and it concluded:

> In this case, [Gach] has been notified that upon his release from [DCS], the United States will take custody of him to determine if he should be removed from the United States. This is one of the consequences of [his] conviction in this matter. The Court . . . advised [him] of this consequence when it stated to [him] during the plea colloquy that "[his] immigration status with the United States could be [affected and he] could be deported . . . ." [He] is subject to deportation or removal from the United States for which [he] was advised.

The court thus overruled Gach's motion to withdraw his plea. Gach timely appealed, and we moved the case to our docket.[5]

## ASSIGNMENT OF ERROR

Gach assigns the district court erred in overruling his motion to withdraw his plea of no contest.

## STANDARD OF REVIEW

[1] The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.[6]

## ANALYSIS

Section 29-1819.02(1) requires that before accepting a plea of guilty or no contest to any criminal offense, "the court shall administer the following advisement on the record to the defendant": "IF YOU ARE NOT A UNITED

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[5] See *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001).

[6] *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES." Section 29-1819.02(2) provides the remedy for failure to give all or part of the immigration advisement. It states in pertinent part:

> If, on or after July 20, 2002, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

[2,3] In *Yos-Chiguil*,[7] we recognized that "failure to give all or part of the advisement required by § 29-1819.02(1) regarding the immigration consequences of a guilty or nolo contendere plea is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 29-1819.02(2)." We held that to state a cognizable claim for relief under § 29-1819.02(2), the defendant must allege and show that (1) the trial court failed to give all or part of the advisement contained in § 29-1819.02(1) and (2) the defendant faces an immigration consequence that was not included in the advisement given. It is the defendant's burden to establish these factors by clear and convincing evidence.[8]

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[7] *State v. Yos-Chiguil, supra* note 4, 278 Neb. at 598, 772 N.W.2d at 580.

[8] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

We consider each *Yos-Chiguil* factor in turn, and we conclude that Gach has established the first factor but has failed to meet his burden with respect to the second factor.

### First Factor Under *Yos-Chiguil*

Regarding the first factor, the record is clear that instead of reciting the advisement set out in § 29-1819.02(1), the district court improvised an advisement. Because the court's advisement failed to give "all or part of" the advisement required under § 29-1819.02(1), the first *Yos-Chiguil* factor is satisfied.[9]

For the sake of completeness, we note the State asks us to find that even when the verbatim statutory advisement is not given, substantial compliance with § 29-1819.02(1) may be sufficient to satisfy the first prong of the test under *Yos-Chiguil*. Because we resolve this appeal by concluding Gach has not satisfied the second prong of *Yos-Chiguil*, we need not decide whether the first prong can ever be satisfied by an advisement which does not follow the statutory language.

However, we take this opportunity to remind lawyers and judges that there is no excuse for failing to administer the statutory advisement to every defendant. Justice Cassel's admonition in his concurrence to *State v. Rodriguez*[10] bears repeating:

> It takes only a moment. The wording is succinct. The statute specifies the precise language. Judges have no reason to improvise or summarize. The "cost" of timely giving advisements is miniscule compared to the "benefit" of avoiding plea withdrawals years after the resulting judgments having been fully executed. Judges should fully and timely comply with the statutory mandate. And the practicing bar should ensure that judges do so.

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[9] See *State v. Yos-Chiguil, supra* note 4, 278 Neb. at 598, 772 N.W.2d at 580.

[10] *State v. Rodriguez*, 288 Neb. 714, 727, 850 N.W.2d 788, 797 (2014) (Cassel, J., concurring).

To be fair, Gach's plea hearing occurred several years before our opinion in *Rodriguez* was released. But the present appeal illustrates the cost to the parties and the justice system in terms of time and resources when the court improvises an immigration advisement instead of giving the advisement contained in § 29-1819.02(1).

### Second Factor Under *Yos-Chiguil*

[4] Under the second factor, Gach must show he is facing an immigration consequence that was not included in the advisement actually given. This factor assumes the advisement, as given, was incomplete or noncompliant and requires a defendant to show he or she faces an immigration consequence that was not included in the advisement actually given. When considering the second factor, two questions must be answered: What immigration consequences is the defendant actually facing, and What immigration consequences were actually communicated to the defendant in the advisement as given?

Section 29-1819.02(1) requires that defendants be advised of two distinct immigration consequences: removal from the United States and denial of naturalization pursuant to the laws of the United States.[11] Both consequences are important, but neither party suggests that denial of naturalization is at issue in this case. Rather, the parties stipulated that Gach is not a U.S. citizen and that an immigration detainer has been filed with DCS requiring it to "detain [Gach] to provide adequate time for [the Department of Homeland Security] to assume [his] custody" in order to "determine whether [he] is subject to removal from the United States."

[5] In *State v. Mena-Rivera*,[12] we held that when the U.S. Department of Homeland Security places an immigration detainer on an individual, that person "'actually faces'" immigration consequences sufficient to claim the protections of

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[11] See *State v. Rodriguez, supra* note 10.

[12] *State v. Mena-Rivera, supra* note 8, 280 Neb. at 955, 791 N.W.2d at 620.

§ 29-1819.02. We conclude Gach has sufficiently shown he "actually faces" the immigration consequence of removal from the United States. We next consider whether the court's immigration advisement, as given, warned Gach of this consequence.

The court advised Gach that his "immigration status with the United States" could be affected and that he "could be deported" as a consequence of the conviction. In denying the motion to withdraw Gach's plea, the court made a specific finding that "[Gach] is subject to deportation or removal from the United States *for which* [*he*] *was advised*." In making this finding, the court used the terms "deportation" and "removal" interchangeably. We express no opinion on whether there is a relevant legal distinction between those terms in the context of this case, because that question was not presented to the district court and has not been raised on appeal. In fact, at oral argument, counsel for both parties suggested the terms are basically synonymous.

It is Gach's burden to show, by clear and convincing evidence,[13] that he is facing an immigration consequence that was not included in the advisement as given by the court. He has shown he is facing the consequence of removal, but he has failed to prove that the court's advisement, as given, did not advise him of that consequence. Gach has failed to satisfy the second prong of the *Yos-Chiguil* test, and on this record, we can find no abuse of discretion in the district court's decision to overrule Gach's motion to withdraw his plea.[14]

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

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[13] See *State v. Mena-Rivera, supra* note 8.

[14] See, *State v. Ortega, supra* note 6; *State v. Yos-Chiguil, supra* note 4.

Nebraska Supreme Court
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# In re Petition of Golden Plains Services Transportation, Inc.
# Golden Plains Services Transportation, Inc., doing business as GPS Transportation, appellant, v. Nebraska Public Service Commission, appellee.

898 N.W.2d 670

Filed June 30, 2017. No. S-16-734.

1. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Administrative Law.** Generally, for purposes of construction, a rule or order of an administrative agency is treated like a statute.
3. ____. Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
4. ____. A regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
5. **Public Service Commission: Administrative Law.** The plain language of 291 Neb. Admin. Code, ch. 3, § 010.01C (2003), does not explicitly limit open class carriers to providing only prearranged services, nor does it explicitly restrict open class carriers from providing on-demand services.

Appeal from the Public Service Commission. Reversed and vacated.

Jack L. Shultz, of O'Neill, Heinrich, Damkroger, Bergmeyer & Shultz, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Kelch, J.

## NATURE OF CASE

This case requires the court to determine whether 291 Neb. Admin. Code, ch. 3, § 010.01C (2003) (Rule 010.01C), limits "open class" carriers to providing only prearranged transportation or whether they may also operate on a for-hire basis.

## FACTS

Golden Plains Services Transportation, Inc. (Golden Plains), is a Nebraska carrier certified to provide open class services. In or before December 2015, the Nebraska Public Service Commission (Commission) received information that Golden Plains might have been operating "on a taxi basis" in its operations. Thereafter, the Commission sent a letter to Golden Plains, informing Golden Plains that it must immediately cease and desist all taxi service operations. Golden Plains then filed a motion for a declaratory ruling on the scope of services it could provide as an open class carrier.

Under 291 Neb. Admin. Code, ch. 1, § 019.05 (1992), "[i]f a petition for declaratory ruling presents a question of statewide commercial importance or such is noted during or after hearing on the petition, the Commission shall not issue a declaratory ruling but will resolve such question in an investigative proceeding." In an order entered April 19, 2016, the Commission found that Golden Plains' petition presented a question of statewide commercial concern and that it must be resolved through an investigative proceeding rather than a declaratory ruling.

After an investigation, the Commission entered an order releasing its interpretation of Rule 010.01C. Interpreting the rule, the Commission found that "open class carriers may

provide transportation to passengers for hire on a prearranged basis only," and may not "provide *on-demand* transportation services to passengers for hire." (Emphasis supplied.)

Rule 010.01C provides:

> Open class service shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle, (ii) along the most direct route between the points of origin and destination or along a route under the control of the person who hired the vehicle and not over a defined regular route, (iii) at a mileage based or per trip fare.

From the order interpreting Rule 010.01C, Golden Plains appeals.

Additional facts relating to the history of the "open class service" definition are set forth in the discussion below.

## ASSIGNMENTS OF ERROR

Golden Plains assigns, combined and restated, that the Commission erred (1) in finding that open class carriers can provide only prearranged service and not on-demand service and (2) in not applying "grandfathering" or "color of right" principles to Golden Plains' past service history.

## STANDARD OF REVIEW

Under Neb. Rev. Stat. § 75-136(2) (Cum. Supp. 2016), an appellate court reviews an order of the Commission de novo on the record.

[1] The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[1]

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[1] *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014); *Mahnke v. State*, 276 Neb. 57, 751 N.W.2d 635 (2008); *Anderson Excavating Co. v. Neth*, 275 Neb. 986, 751 N.W.2d 595 (2008); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 272 Neb. 390, 722 N.W.2d 10 (2006).

## ANALYSIS

[2-4] Generally, for purposes of construction, a rule or order of an administrative agency is treated like a statute.[2] Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.[3] A regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.[4]

Rule 010.01C provides:

> Open class service shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle, (ii) along the most direct route between the points of origin and destination or along a route under the control of the person who hired the vehicle and not over a defined regular route, (iii) at a mileage based or per trip fare.

[5] Neither party contends that any portion of Rule 010.01C is ambiguous. And the plain language of Rule 010.01C does not explicitly limit open class carriers to providing only prearranged services, nor does it explicitly restrict open class carriers from providing on-demand services. Because there is no language within the rule to support the Commission's interpretation that open class carriers are limited to prearranged services only, we conclude that such an interpretation is clearly erroneous.

The Commission argues that the order releasing the rule interpretation was within the scope of its authority under Neb. Rev. Stat. § 75-118.01 (Reissue 2009), which authorizes the Commission to determine the scope and meaning of a

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[2] *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007) (superseded by statute on other grounds as stated in *Telrite Corp. v. Nebraska Pub. Serv. Comm.*, 288 Neb. 866, 852 N.W.2d 910 (2014)); *Stratbucker Children's Trust v. Zoning Bd. of Appeals*, 243 Neb. 68, 497 N.W.2d 671 (1993).

[3] See *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002).

[4] *Id.*

regulation. In support of this argument, it cites *In re Proposed Amend. to Title 291*.[5] In that case, the Commission had released orders defining the terms "limousine" and "limousine service," which were used but not defined in the Commission's motor carrier rules. A limousine company appealed the orders, alleging that the Commission acted outside its authority by creating new rules without following the procedures required under the Administrative Procedure Act. However, we concluded that the Commission was not creating new rules, but "interpret[ing] existing rules and regulations pursuant to its authority under § 75-118.01."[6]

The Commission's reliance on *In re Proposed Amend. to Title 291* is misplaced. In that case, we found that § 75-118.01 authorized the Commission to interpret the terms "limousine" and "limousine service" as they were used within the regulation at issue. Here, however, the Commission is not defining any term or interpreting any language within Rule 010.01C. Instead, it effectively created a new regulation by reading a meaning into the regulation that had no terms or language to support it.

Since the plain language of Rule 010.01C clearly does not restrict open class service providers from providing on-demand services, we need not rely on the history of the rule. But, here, we note that the Commission's previous interpretation of the rule is inconsistent with the interpretation set forth in the order at issue in this appeal.

On February 5, 2002, when the Commission adopted the definition of "open class service" that is codified in Rule 010.01C, it stated in a comment below the definition:

> No commenter expressly opposed this amendment. . . . Again, the Commission has provided for trips by an open class service provider that are made by a "prearranged

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[5] *In re Proposed Amend. to Title 291*, 264 Neb. 298, 646 N.W.2d 650 (2002) (superseded by statute on other grounds as stated in *Telrite Corp. v. Nebraska Pub. Serv. Comm.*, 288 Neb. 866, 852 N.W.2d 910 (2014)).

[6] *Id.* at 309, 646 N.W.2d at 659.

> fare contract" and/or on a demand basis. The Commission believes that this would grant carriers the flexibility to provide transportation service on a prearranged basis and demand basis, while, at the same time, widening the distinction between open class and taxicab service.

The above comments show that at the time Rule 010.01C was adopted, the Commission interpreted it to allow open class carriers to provide services on a prearranged or on-demand basis.

Moreover, the Commission has shown that when it wants to limit service providers to prearranged services only, it has done so. For example, Neb. Admin. Code, ch. 3, § 010.01B, now defines "limousine service" as "(i) the business of carrying passengers for hire by a vehicle, (ii) along a route under the control of the person who hired the vehicle and not over a defined regular route, (iii) on a prearranged *and not on a demand basis*." (Emphasis supplied.) That the Commission did not add such limiting language to the definition of "open class service" is an unambiguous expression of its intent not to restrict open class service providers in this manner.

Although the current rules allow the Commission to restrict the authority granted to certain providers on a case-by-case basis when such restriction is deemed "necessary and reasonable and in the public interest,"[7] the Commission may not restrict all open class service providers by reading a restriction into Rule 010.01C that is not there. To do so would allow the Commission to create a new rule without complying with the rulemaking obligations under the Administrative Procedure Act.

## CONCLUSION

Because the Commission's interpretation is not supported by the language of Rule 010.01C, we reverse and vacate the order releasing the Commission's interpretation of such rule.

Reversed and vacated.

Funke, J., not participating.

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[7] See 291 Neb. Admin. Code, ch. 3, § 010.02A (2003).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Mary Cohan and Terry Cohan, individually and as wife and husband, appellants and cross-appellees, v. Medical Imaging Consultants, P.C., et al., appellees and cross-appellants.

900 N.W.2d 732

Filed July 7, 2017. No. S-16-145.

1. **Directed Verdict: Evidence: Appeal and Error.** A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. In reviewing that determination, an appellate court gives the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.
2. **Physician and Patient: Negligence.** Nebraska does not recognize the loss-of-chance doctrine.
3. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries.
4. **Malpractice: Physicians and Surgeons: Proximate Cause: Damages.** In the medical malpractice context, the element of proximate causation requires proof that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
5. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
6. **Damages.** The amount of damages for pain, suffering, and emotional distress inherently eludes exact valuation.

7. ____. The amount of damages for pain, suffering and emotional distress is a matter left largely to the discretion of the fact finder, which saw the witnesses and heard the evidence.
8. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
9. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Richard J. Rensch and Sean P. Rensch, of Rensch & Rensch Law, P.C., L.L.O., for appellants.

David D. Ernst and Kellie Chesire Olson, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees Medical Imaging Consultants, P.C., and Robert M. Faulk, M.D.

William R. Settles and Kate Geyer Johnson, of Lamson, Dugan & Murray, L.L.P., for appellees Bellevue Obstetrics and Gynecology Associates, P.C., et al.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Kelch, J.

## I. INTRODUCTION

Mary Cohan and Terry Cohan brought a medical malpractice action against Medical Imaging Consultants, P.C.; Robert Faulk, M.D.; Bellevue Obstetrics and Gynecology Associates, P.C.; Michael Woods, M.D.; and Michelle Berlin, a physician's assistant (collectively Appellees). They alleged that Appellees' negligent treatment caused Mary's breast cancer to progress undiagnosed for 1 year and that her delayed

treatment caused physical and mental suffering, a shortened life expectancy, loss of consortium for Terry, and an increased risk of recurrence, entitling the Cohans to damages. After the Cohans presented their case in chief to a jury, the district court for Douglas County granted Appellees' motion for a directed verdict and dismissed the Cohans' complaint with prejudice. The Cohans now appeal and ask us to adopt the loss-of-chance doctrine. Appellees cross-appeal, alleging that the district court erred in allowing certain expert testimony. We decline to adopt the loss-of-chance doctrine. However, we conclude that, as to Mary's cause of action, the Cohans have met their burden under the traditional medical malpractice standard. We therefore affirm in part and in part reverse, and remand for a new trial, wherein the district court may address the evidentiary issues raised on cross-appeal, in light of this opinion.

## II. BACKGROUND

In accordance with our standard of review, the following facts give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.[1]

On August 8, 2008, Mary underwent a diagnostic examination at a hospital in Papillion, Nebraska, after reporting that she felt some small lumps in her left breast. The diagnostic examination, which consisted of a mammogram with additional imaging and ultrasound, showed no abnormalities.

The following year, on October 12, 2009, Mary attended her annual physical examination with Berlin, a physician's assistant for Dr. Woods at Bellevue Obstetrics and Gynecology Associates. Mary told Berlin that Mary had lumps in her left breast and that she was concerned about the appearance of her left nipple. Shortly after this appointment, on October 21, Mary underwent a screening mammogram with Medical

[1] See *Scheele v. Rains*, 292 Neb. 974, 874 N.W.2d 867 (2016).

Imaging Consultants. Dr. Faulk read the mammogram as normal, with no evidence of malignancy.

A year later, in October 2010, Mary's annual mammogram identified an abnormality in her left breast. Further testing revealed a cancerous tumor. As a result, Mary underwent chemotherapy and radiation; a double mastectomy, during which surgeons also removed axillary lymph nodes; and reconstructive surgery. Upon removal, the cancerous tumor measured 7.1 centimeters in diameter. Examination of the lymph nodes showed that the tumor had metastasized, or spread, to 19 of the 24 lymph nodes removed.

On December 4, 2015, the Cohans filed an amended complaint against Appellees. They alleged that Appellees were negligent in failing to detect abnormalities in Mary's examinations in 2009 that would have led to the discovery of cancer prior to the discovery in 2010. They further alleged that Mary was prevented from being afforded a better outcome because of the yearlong delay in diagnosing the cancer and that she further sustained damages from a shortened life expectancy and physical and mental suffering. The Cohans incorporated the same allegations into Terry's cause of action and averred that Terry has and will sustain damages due to a loss of consortium.

Mary testified about the emotional trauma, anxiety, agony, and distress she experienced when she received the cancer diagnosis and had to decide whether to undergo surgical removal of one or both breasts. For a time, she took Xanax, an antianxiety medication, to help her cope. Mary testified that she also had mental pain and anguish as a result of the yearlong delay in diagnosis, and we set forth a portion of that testimony in the analysis section below. Mary further testified that 5 years after her diagnosis, she talked to her surgeon about the relative risk of recurrence and that that conversation caused her more anxiety than she had already been suffering. As of the time of trial, Mary had not experienced a recurrence of cancer.

Mary testified about the pain, fatigue, and other negative experiences incident to her surgery, chemotherapy, and radiation treatments. She stated that at the time of trial, she still had pain from the mastectomy. Mary described herself as "disfigured" after the reconstructive surgery "turned out horrible" due to the effects of radiation treatments. At the time of trial, she had "huge scars" and no nipples, her breasts were "lopsided" and "ugly," and one breast was as "hard as a rock." At the time of trial, Mary was taking medication to prevent cancer from recurring. She testified that this was stressful for her and that the medication weakened her bones. Mary also testified that she wore a compression sleeve on her left arm all day due to a condition called lymphedema, which, she stated, developed as a result of removing "quite a few lymph nodes."

Terry testified that he and Mary were married on September 4, 1982. He stated that he had been with her throughout her cancer diagnosis, treatment, and surgery. Terry described the entire experience as "quite traumatic" for them both, particularly following the diagnosis, when they were both "very upset, confused, [and] distraught." At the time of trial, Mary's emotional reaction to the cancer was not as intense as it was initially, but Mary still expressed concerns to Terry "[a]ll the time." Terry confirmed that Mary had used Xanax to help her cope but that she was not using it at the time of trial.

In addition to Terry's testimony, the Cohans presented deposition testimony of three expert witnesses. Dr. Catherine Appleton, a diagnostic radiologist with a subspecialty in breast imaging, opined that the 2009 mammogram showed an abnormality in Mary's left breast, which Dr. Appleton believed to be a cancerous tumor. In Dr. Appleton's opinion, to comply with the standard of care, Dr. Faulk should have taken further action to diagnose Mary's cancer following Mary's 2009 appointment and mammogram. She testified that had Mary undergone diagnostic imaging of her breast in 2009, more likely than not, the breast cancer would have been found. According to Dr. Appleton, the tumor grew in the interim

between the 2009 mammogram and the ultimate cancer diagnosis in 2010.

Dr. Appleton's testimony indirectly addressed the issue of breast conservation. Without prior evidence of Dr. Appleton's opinion about Mary's eligibility for breast-conserving surgery, the following colloquy occurred:

> Q. And while you may have the opinion that [Mary] might have been eligible to have breast conserving surgery if her cancer had been diagnosed in 2009, that decision is actually up to the patient, isn't it, whether to have a lumpectomy or a mastectomy or some other form of treatment?
>
> A. Well, to the extent that a surgeon can offer breast conservation therapy, there is a discussion between the surgeon and the patient. Some patients will not be offered breast conservation therapy. But on the other side of the coin, some patients who could get a lumpectomy choose to have a mastectomy. So it can go one way, but there are times when a patient just simply will not be offered breast conservation due to the extent of [the] disease. So it's not simply up to the patient.
>
> . . . .
>
> Q. Even if [Mary] was diagnosed with breast cancer in 2009 or even in 2008, and even she was — even if it would have been a stage 2 cancer at that time and she might have been eligible for a lumpectomy operation if she wanted to choose that option, she still was going to have to have some sort of operation on her breast, true?
>
> A. Yes. That would be convention, yes.

A 2010 MRI report received into evidence stated that the condition of Mary's left breast "would likely contraindicate nipple sparing procedures."

The Cohans presented the deposition testimony of Dr. Paul Gatewood, an obstetrician-gynecologist, who stated that Berlin had deviated from the standard of care in 2009. When asked whether he an opinion about what Mary's outcome would

have been had Berlin acted within the standard of care, Dr. Gatewood testified that the cancer would have been discovered in 2009. He observed that early diagnosis is the key to survival of any cancer, particularly breast cancer. He explained that the natural progression of a tumor is to grow until it is treated. Dr. Gatewood opined that had Mary's cancer been discovered a year earlier, the tumor likely would have been smaller and the lymph node involvement less extensive.

The Cohans also presented the deposition testimony of oncologist Dr. Michael Naughton, who explained the progression of the cancer and the risk of recurrence. Before Dr. Naughton's trial deposition testimony was presented to the jury, the district court overruled Appellees' motions to strike portions pertaining to risk of recurrence and loss-of-chance damages. The district court reasoned that the testimony was allowed by *Rankin v. Stetson*,[2] as "evidence that early intervention would more likely than not have led to an improved outcome."

Dr. Naughton estimated that in 2009, Mary's cancer likely involved a 3.5 centimeter tumor and up to 3 lymph nodes, in contrast with the 7.1 centimeter tumor and 19 cancerous lymph nodes discovered in 2010. He testified that Mary's tumor was moderately aggressive and that a tumor generally becomes more aggressive rather than less aggressive over time. Further, he testified that a tumor often develops the ability to spread at some point in its life cycle. Dr. Naughton stated that the smaller the cancerous tumor and the fewer lymph nodes involved at the time of diagnosis, the better the prognosis for the patient; whereas, the larger the tumor and the more lymph nodes infiltrated, the greater the risk of recurrence. He affirmed that risk of recurrence generally meant cancer manifesting itself distantly, past the nodes.

Dr. Naughton testified that the risk of recurrence "essentially starts at day zero from diagnosis and is continuous at a

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[2] *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008).

relatively stable level for the first ten years from diagnosis." He further explained that "roughly half the estimated recurrences happen in the first five years" and that the risk of recurrence is reduced when there has been no recurrence during the first five years following diagnosis. However, according to medical records, Mary's surgeon advised her that "we see more recurrences of hormone driven cancers in the second five years rather than the first."

Dr. Naughton testified that the risk of recurrence was based on population data and could not be extrapolated to an individual level and that he could not predict whether a specific person would fall into the group that experiences a recurrence. According to Dr. Naughton, risk of recurrence data is used to counsel individual patients about risk and to "classify women in a risk group so we can do clinical trials so we can study how different risk groups behave and respond to therapy."

Based on population data, Dr. Naughton testified that considering the type of cancer discovered in 2010, Mary's 10-year risk of recurrence "distantly is at least 75 percent." Dr. Naughton acknowledged that Mary's medical records as recently as 2014 showed no recurrence of cancer since her initial diagnosis in 2010 and that it was his understanding that Mary had experienced no recurrence. He testified that, consequently, her prognosis as to her rate of recurrence was better at the time of his 2015 deposition than it was when she was first diagnosed 5 years earlier, in 2010. He estimated that because Mary had "lived through approximately half of her risk," her 10-year recurrence risk moving forward from the time of trial was "as low as 35 percent."

Dr. Naughton also testified that had Mary's cancer been discovered in October 2009, her 10-year risk of recurrence would have been approximately 30 percent. He estimated that because Mary had lived through 6 years, or 60 percent, of that 10-year period, her residual risk of recurrence at the time of trial was 12 percent.

At the close of the Cohans' case in chief, Appellees moved for a directed verdict on the basis that the Cohans failed to make a prima facie case of causation and damages against them. The district court granted the motion and stated:

> As far as the directed verdict on causation and damages are concerned . . . I'm satisfied that there is sufficient evidence of negligence that that issue would go before the jury.
>
> I'm further satisfied that there is no probative evidence of damage [to Terry]. There's no testimony with regard to [Terry's] claim.
>
> And with regard to [Mary's] claim, I am satisfied that there is no sufficient proof of damage or causation other than the loss of chance of a . . . lower rate of non-recurrence. And under the law of Nebraska at the present time that does not constitute a proper measure of damage.
>
> For that reason I must sustain the motions for directed verdict filed by [Appellees] in this matter.

The Cohans now appeal this ruling.

Appellees cross-appeal, challenging the district court's ruling on their motions to strike testimony by Dr. Naughton.

## III. ASSIGNMENTS OF ERROR

On direct appeal, the Cohans assign that the district court erred in (1) granting Appellees' motions for directed verdict on the issues of proximate cause and damages and (2) dismissing the Cohans' first amended complaint on the basis that Mary failed to offer sufficient proof of damages or causation other than a "'loss of chance of a lower rate of non-recurrence.'"

On cross-appeal, Appellees essentially assign that the district court erred in denying their motions to strike Dr. Naughton's testimony.

## IV. STANDARD OF REVIEW

[1] A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.[3]

## V. ANALYSIS

### 1. Mary's Claim

The Cohans approach this appeal from two different perspectives. They claim that they have met the traditional burden of proof for a medical malpractice claim but that if not, we should adopt the loss-of-chance doctrine and/or the Restatement (Second) of Torts.[4]

First, they point to their experts' opinions that Appellees were negligent in not locating the tumor in 2009 and that such negligence increased Mary's risk of distant metastatic recurrence, which was 30 percent if the tumor had been discovered in 2009, but rose to 75 percent by the time the tumor was discovered 1 year later. Based upon this testimony, the Cohans argue that the district court should not have granted a directed verdict, thus precluding consideration by a jury, because sufficient prima facie evidence had been presented showing (1) that there was a deviation from the standard of care by Appellees and (2) that the deviation was a proximate cause of Mary's injuries. However, the Cohans' arguments in regard to Mary's chances of survival are valid only if Nebraska adopts the loss-of-chance doctrine, a doctrine which, as discussed in more detail below, we have not adopted to date.

#### (a) Loss-of-Chance Doctrine

The loss-of-chance doctrine is based upon the Restatement (Second) of Torts, which provides:

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[3] *Scheele v. Rains, supra* note 1.

[4] See Restatement (Second) of Torts § 323 (1965).

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.[5]

One of the early discussions in regard to the loss-of-chance doctrine was a 1981 law journal article,[6] which reasoned:

> Causation refers to the cause and effect relationship that must be established between tortious conduct and a loss before liability for that loss may be imposed. Causation questions relate to the fact of a loss or of its source. Valuation is the process of identifying and measuring the loss that was caused by the tortious conduct. . . .
>
> . . . .
>
> [The courts'] failure to distinguish between the functions of causation and valuation, or to identify and value rationally the true interests lost, has created a serious gap in the remedial structure. Courts have had difficulty perceiving that a chance of avoiding some adverse result or of achieving some favorable result is a compensable interest in its own right. In some respects the notion of chance has been subsumed into the final result. When this occurs, the loss of a chance of avoiding some adverse result or achieving some favorable result either is completely redressed or is denied, depending on the likelihood, destroyed by the defendant's tortious conduct, of avoiding or achieving the particular result.

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[5] *Id.* at 135.

[6] Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353, 1353-54 (1981).

> . . . [T]he loss of a chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately, rather than treated as an all-or-nothing proposition.

Courts have taken this loss-of-chance discussion and applied it to medical malpractice actions by requiring a plaintiff to prove by a preponderance of the evidence that the medical provider's negligence caused the plaintiff's injury, where the injury consists of the diminished likelihood of achieving a more favorable medical outcome.[7] However, they have adopted different permutations of the loss-of-chance doctrine.

> One version, commonly termed the "relaxed causation" approach, simply loosens the traditional standard of evidentiary sufficiency, permitting the causation issue to be resolved by the fact finder even though there is no evidence of a reasonable probability that the defendant's negligence caused the patient's death or other ultimate harm. . . .
>
> Under the relaxed causation approach, the patient's ultimate death or injury, and not the lost chance itself, continues to be treated as the relevant harm when determining proximate cause. Hence, even while the lost chance may be less than even, full damages are awarded in the same manner as if the plaintiff had established causation under traditional principles. . . .
>
> . . . .
>
> . . . Other states, typically relying on the Second Restatement of Torts § 323(a), allow the case to be submitted based on evidence that the defendant's negligence increased the risk of the ultimate harm. . . .
>
> . . . .
>
> . . . Under this approach, damages are limited solely to the value of the lost chance.[8]

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[7] See, e.g., *Matsuyama v. Birnbaum*, 452 Mass. 1, 890 N.E.2d 819 (2008).

[8] *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397, 401-02 (Tex. 1993) (citations omitted).

The Cohans note that several states have adopted some version of the loss-of-chance doctrine.[9] In particular, the Cohans cite to *Matsuyama v. Birnbaum*,[10] a Massachusetts case which involved the death of the patient. There, the court held:

> "[I]njury" need not mean a patient's death. Although there are few certainties in medicine or in life, progress in medical science now makes it possible, at least with regard to certain medical conditions, to estimate a patient's probability of survival to a reasonable degree of medical certainty. . . That probability of survival is part of the patient's condition. When a physician's negligence diminishes or destroys a patient's chance of survival, the patient has suffered real injury. The patient has lost something of great value: a chance to survive, to be cured, or otherwise to achieve a more favorable medical outcome.[11]

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[9] See, *Thompson v. Sun City Community Hosp., Inc.*, 141 Ariz. 597, 688 P.2d 605 (1984); *Ferrell v. Rosenbaum*, 691 A.2d 641 (D.C. 1997); *Holton v. Memorial Hosp.*, 176 Ill. 2d 95, 679 N.E.2d 1202, 223 Ill. Dec. 429 (1997); *Cahoon v. Cummings*, 734 N.E.2d 535 (Ind. 2000); *DeBurkarte v. Louvar*, 393 N.W.2d 131 (Iowa 1986); *Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994); *Hastings v. Baton Rouge Gen. Hos*p., 498 So. 2d 713 (La. 1986); *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. 1992); *Aasheim v. Humberger*, 215 Mont. 127, 695 P.2d 824 (1985); *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589 (1991); *Evers v. Dollinger*, 95 N.J. 399, 471 A.2d 405 (1984); *Alberts v. Schultz*, 126 N.M. 807, 975 P.2d 1279 (1999); *Roberts v. Permanente Med. Group*, 76 Ohio St. 3d 483, 668 N.E.2d 480 (1996); *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467 (Okla. 1987); *Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978); *Jorgenson v. Vener*, 616 N.W.2d 366 (S.D. 2000) (abrogated by statute as stated in *Smith v. Bubak*, 643 F.3d 1137 (8th Cir. 2011)); *Brown v. Koulizakis*, 229 Va. 524, 331 S.E.2d 440 (1985); *Herskovits v. Group Health*, 99 Wash. 2d 609, 664 P.2d 474 (1983); *Thornton v. CAMC, Etc.*, 172 W. Va. 360, 305 S.E.2d 316 (1983); *Ehlinger v. Sipes*, 155 Wis. 2d 1, 454 N.W.2d 754 (1990); *McMackin v. JCHC*, 88 P.3d 491 (Wyo. 2004).

[10] *Matsuyama v. Birnbaum, supra* note 7.

[11] *Id.* at 16, 890 N.E.2d at 832 (citations omitted).

In countering these arguments, the Texas Supreme Court in *Kramer v. Lewisville Memorial Hosp*.[12] noted that the real harm in any case is whether the patient ultimately suffers a recurrence or death. The court in *Kramer* went on to state:

> Unless courts are going to compensate patients who "beat the odds" and make full recovery, the lost chance cannot be proven unless and until the ultimate harm occurs. . . . Hence, legal responsibility under the loss of chance doctrine is in reality assigned based on the mere *possibility* that a tortfeasor's negligence was a cause of the ultimate harm.[13]

Although we find this reasoning persuasive, we acknowledge that the loss-of-chance doctrine has a level of attractiveness in protecting patients who are struggling with a serious medical situation, but, as we discuss later, the doctrine also comes with inherent drawbacks.

Were we to apply the loss-of-chance doctrine in the instant case, with Mary not having a recurrence as of the time of trial, the damages would represent the "mere possibility" that the tort-feasors' negligence caused ultimate harm, a harm which may never occur. Even a court which adopted a version of the loss-of-chance doctrine recognized that some versions of that doctrine allow "a jury to speculate on causation because expert testimony that a physician's negligence *probably* caused the total damages is not required."[14] Here, the jury would be left to speculate on possible harm in the future, since there was no evidence of Mary's chance of survival even if the cancer returned. The Cohans' expert only opined regarding the chance of recurrence, which, at the time of trial, was 30 percent.

In addition, although we are sympathetic to the Cohans' situation, adoption of the loss-of-chance doctrine in this case

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[12] *Kramer v. Lewisville Memorial Hosp., supra* note 8.

[13] *Id.* at 405 (citation omitted) (emphasis in original).

[14] *DeBurkarte v. Louvar, supra* note 9, 393 N.W.2d at 137 (emphasis in original).

would create unwarranted liability in other cases and other medical contexts. It would, for example, reduce the standard of causation to a mere possibility rather than a preponderance of the evidence and allow for lawsuits in which the patient involved had only a slight chance of survival even prior to the medical professional's negligent conduct. Although no profession should avoid the consequences of negligent conduct, we choose not to lower the well-established standard of causation.

Lastly, as noted by the court in *Kramer*, how does an appellate court avoid the application of the loss-of-chance doctrine in other areas of the law, beyond medical malpractice? For example, does an unsuccessful litigant have a cause of action where an attorney's failure to object to evidence which negligently reduced the chance of success by some degree? After reviewing the several arguments for and against, we decline to adopt either the loss-of-chance doctrine or § 323 of the Restatement (Second) of Torts.

[2] Finally, the Cohans argue that this court has already adopted the loss-of-chance doctrine in Nebraska. They point to *Steineke v. Share Health Plan of Neb.*,[15] where the dissenting opinion argued that in *Washington v. American Community Stores Corp.*,[16] this court had "wittingly or unwittingly, wisely or unwisely, . . . recognized loss of chance as an element of tort damages." But the dissent also stated, "Perhaps the majority opinion has, knowingly or otherwise, silently overruled *Washington*."[17] Although past dissenting justices have expressed a desire to consider the loss-of-chance doctrine, we do not find this language controlling, especially, in view

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[15] *Steineke v. Share Health Plan of Neb.*, 246 Neb. 374, 381, 518 N.W.2d 904, 909 (1994) (Caporale, J., dissenting; Lanphier, J., joins).

[16] *Washington v. American Community Stores Corp.*, 196 Neb. 624, 244 N.W.2d 286 (1976).

[17] *Steineke v. Share Health Plan of Neb., supra* note 15, 246 Neb. at 381, 518 N.W.2d at 909 (Caporale, J., dissenting; Lanphier, J., joins).

of the more recent case of *Rankin v. Stetson*,[18] where we specifically stated, "We agree that an opinion framed in terms of loss of chance would not sustain [the plaintiff's] burden of establishing that the defendants proximately caused her injury. We also note that Nebraska has not recognized the loss-of-chance doctrine."

To further support their contention that we have already adopted the loss-of-chance doctrine, the Cohans point to our previous approval of NJI2d Civ. 4.09, suggesting that "'[i]f you cannot separate damages caused by the pre-existing conditions from those caused by the accident, then the defendant is liable for all of those damages.'"[19] In *David v. DeLeon*,[20] we stated:

> "'In an action for damages for personal injuries caused by a wrongful act or omission, the injured person is entitled to recover full compensation for all damage proximately resulting from the defendant's act, even though his injuries may have been aggravated by reason of his pre-existing physical or mental condition, rendered more difficult to cure by reason of his state of health, or more serious, because of a latent disease, than they would have been had he been in robust health. . . .'"

However, we also stated, "We find that this instruction was the correct statement of the law and that it did not misstate the burden of proof: the instruction does not permit a jury to assess damages in any amount unless *the plaintiff first proves proximate cause*."[21] Our statement in *David* is consistent with the principle that the Cohans had the initial burden to prove causation of damages before a jury could proceed to apportioning damages.

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[18] *Rankin v. Stetson, supra* note 2, 275 Neb. at 787, 749 N.W.2d at 469.

[19] See *David v. DeLeon*, 250 Neb. 109, 113, 547 N.W.2d 726, 729 (1996). See, also, NJI2d 4.09, comment.

[20] *David v. DeLeon, supra* note 19, 250 Neb. at 114, 547 N.W.2d at 729, quoting 22 Am. Jur. 2d *Damages* § 122 (1965).

[21] *Id.* at 114, 547 N.W.2d at 730 (emphasis supplied).

Furthermore, we note that in some instances, the application of the loss-of-chance doctrine, with its relaxed burden of proof, could prove contradictory to the Nebraska Hospital-Medical Liability Act, under which the claimant may recover damages only for those losses that are the direct and proximate result of the defendant's wrongful actions, as established by a preponderance of the evidence.[22]

After considering the Cohans' arguments, we conclude that this court has not adopted the loss-of-chance doctrine, and we shall not adopt it at this time.

### (b) Present Standard for Medical Malpractice Action

Next, the Cohans argue that the district court should not have granted a directed verdict, because they presented sufficient prima facie evidence showing causation and damages under our present standard for a medical malpractice action.

[3,4] Currently, in Nebraska, in a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries.[23] In the medical malpractice context, the element of proximate causation requires proof that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.[24] The Cohans contend they have met these standards through their evidence and that as result, the jury, as trier of the facts, should resolve conflicts in the evidence and determine the weight and credibility to be given to the testimony of witnesses.[25] However, the jury here was forestalled from deliberating on

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[22] See Neb. Rev. Stat. § 44-2819 (Reissue 2010).

[23] *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004).

[24] *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

[25] See *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999).

the evidence by the directed verdict, the propriety of which we now consider on appeal.

[5] A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.[26] If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.[27] But at the same time, we do not allow juries to engage in speculation or conjecture in determining damages.[28]

The question becomes whether, giving Mary the benefit of every controverted fact and all reasonable inferences from the evidence, there was any evidence upon which the jury could have based a finding in her favor. Here, the reasonable inferences from the evidence reflect that Appellees were negligent in not diagnosing Mary's cancer in 2009; that, as a result, the tumor grew from approximately 3.5 centimeters in 2009 to 7.1 centimeters in 2010; that the number of lymph nodes affected increased from approximately 3 to 19; that the 2010 MRI report stated that the condition of Mary's left breast "would likely contraindicate nipple sparing procedures"; and that Mary experienced anxiety following her diagnosis. Lastly, Mary further testified regarding pain and suffering as follows:

> Q. . . . Well, have you felt — have you felt bad, any mental pain or anguish as a result of what you feel happened to you as a result of having a delay in the diagnosis of your cancer?
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> . . . .

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[26] *Scheele v. Rains, supra* note 1.

[27] See *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996).

[28] See *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

> [Mary]: Yes, I feel a lot of anxiety about that. A lot. Because the reality is it wasn't caught in an early stage. It was an advanced stage. And I suffer from extreme anxiety and stress and depression from not knowing if I'm going to live. I don't know if I'm going to make it. Time will tell. But I don't know.

[6,7] By this testimony, Mary stated that she had incurred mental pain or anguish as a result of the delayed cancer diagnosis. Whether Mary's damages for anxiety were directly related to the delay in diagnosis or a consequence of discovering the cancer would have been a question of fact for the jury to determine. Although no specific dollar amounts were attached to her emotional injuries, the amount of damages for pain, suffering, and emotional distress inherently eludes exact valuation.[29] It is a matter left largely to the discretion of the fact finder, which saw the witnesses and heard the evidence.[30] Considering the jury's role as the fact finder and the evidence as a whole, we conclude that the Cohans presented evidence that could have sustained a finding for Mary on the issue of damages. Thus, the district court erred in granting Appellees' motions for directed verdict.

### 2. Terry's Claim

Terry claims the district court also erred in granting a directed verdict on his claim. However, although Terry confirmed the evidence presented by Mary, he failed to present sufficient evidence supporting his own cause of action. Therefore, the district court did not err in granting a directed verdict on his claim.

### 3. Cross-Appeals by Appellees

Appellees' cross-appeals assign as error the admission of Dr. Naughton's testimony. Appellees moved to strike Dr. Naughton's testimony because they claimed that only Mary's

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[29] *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[30] *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

prognosis at the time of trial was relevant and that Nebraska did not recognize a theory of recovery based upon loss of chance. The district court, in overruling the motions to strike, found that Dr. Naughton's opinion was relevant for the limited purpose of establishing that early discovery of cancer leads to a better prognosis.

[8,9] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[31] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.[32]

Appellees first argue that the district court should not have allowed testimony concerning damages which was based upon a life expectancy or likelihood of recurrence but did not reflect Mary's condition at the time of trial. This argument stems from Dr. Naughton's testimony that Mary's risk of recurrence had fallen to 30 percent at the time of trial. Basically, Appellees request that damages be limited to Mary's condition at the time of trial. We decline to adopt this theory.

In Nebraska, proven damages which are proximately caused by a breach of duty are recoverable. We have said that "'[i]n an action for damages for personal injuries caused by a wrongful act or omission, the injured person is entitled to recover full compensation for all damage proximately resulting from the defendant's act . . . .'"[33] And we have also found the term "personal injury" to be broad in scope.[34]

Accordingly, the district court did not err in refusing to limit Dr. Naughton's testimony to Mary's condition solely at the time of trial. Of course, a party can present evidence

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[31] *Gallner v. Larson*, 291 Neb. 205, 865 N.W.2d 95 (2015).

[32] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[33] *McCall v. Weeks*, 183 Neb. 743, 750, 164 N.W.2d 206, 210 (1969).

[34] See *Gallion v. O'Connor*, 242 Neb. 259, 494 N.W.2d 532 (1993).

reflecting an injured party's current condition for any relevant purpose such as to mitigate damages. But the amount of damages, proximately caused, is an issue for the trier of fact to assess and weigh.[35]

Next, Appellees argue that Dr. Naughton's testimony should have been excluded because it pertained only to the loss-of-chance doctrine. We have determined that Nebraska does not recognize the loss-of-chance doctrine. Therefore, any evidence offered solely for that purpose would be in error. But the district court did not err in finding Dr. Naughton's testimony relevant for the limited purpose of establishing that early discovery of cancer leads to a better prognosis. And within the parameters of the district court's ruling, Dr. Naughton's testimony corroborated other evidence of negligent conduct.

We conclude that Appellees' cross-appeals lack merit. However, upon retrial, the district court shall rule on the parties' motions and objections with due consideration of our holding on the loss-of-chance doctrine.

## VI. CONCLUSION

For the aforementioned reasons, as to Mary's cause of action, we conclude that the district court erred in granting Appellees' motions for directed verdict and we reverse the matter for a new trial. However, we affirm the directed verdict granted as to Terry's cause of action. We further find no merit in Appellees' cross-appeals.

Affirmed in part, and in part reversed and remanded for a new trial.

Funke, J., not participating.

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[35] See *Union Ins. Co. v. Bailey*, 234 Neb. 257, 450 N.W.2d 661 (1990) (question of amount of damages to be awarded is solely one for fact finder).

Nebraska Supreme Court
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# Farmers Cooperative, a cooperative corporation organized under the laws of the State of Nebraska, appellant, v. State of Nebraska et al., appellees.

# Frontier Cooperative Company, a cooperative corporation organized under the laws of the State of Nebraska, appellant, v. State of Nebraska et al., appellees.

898 N.W.2d 674

Filed July 7, 2017. Nos. S-16-312, S-16-313.

SUPPLEMENTAL OPINION

Appeals from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Thomas E. Jeffers and Andrew C. Pease, of Crosby Guenzel, L.L.P., for appellants.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Per Curiam.

Cases Nos. S-16-312 and S-16-313 are before this court on the appellees' motion for rehearing concerning our opinion

in *Farmers Co-op v. State*.[1] We overrule the motion, but we modify the original opinion as follows:

(1) We withdraw the last two sentences in the paragraph preceding the subheading "(b) Frontier's Refund Claims" and substitute the following: "Farmers appealed the Tax Commissioner's decision to the district court for Lancaster County."[2]

(2) We withdraw the last two sentences in the paragraph preceding the subheading "(c) District Court's Decisions" and substitute the following: "Frontier appealed the Tax Commissioner's decision to the district court for Lancaster County."[3]

(3) We withdraw the second to the last sentence in the second paragraph under the subheading "3. The Cooperatives Failed to Establish They Were Entitled to Refund of Taxes Denied by Tax Commissioner" and substitute the following: "Neither of the Cooperatives requested a formal hearing from the Department prior to the Tax Commissioner taking action on their refund claims, so no additional evidence was developed on the record regarding the denied claims."[4] And we withdraw the last sentence of that same paragraph, which stated, "Further, the Cooperatives did not submit any additional evidence to the district court on its appeal."[5]

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motion for rehearing overruled.

Stacy, J., not participating.

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[1] *Farmers Co-op v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017).

[2] *Id.* at 351, 893 N.W.2d at 733.

[3] *Id.* at 352, 893 N.W.2d at 734.

[4] *Id.* at 364, 893 N.W.2d at 740.

[5] *Id.*




**Nebraska Supreme Court**

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# Dawn McGauley, as Personal Representative of the Estate of James E. McGauley, deceased, appellant, v. Washington County, a corporation and political subdivision of the State of Nebraska, and Martin Marietta Materials, Inc., appellees.

897 N.W.2d 851

Filed July 7, 2017. No. S-16-897.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly erroneous.
2. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act provides limited waivers of sovereign immunity, which are subject to statutory exceptions.
4. **Political Subdivisions Tort Claims Act.** The discretionary function exception of the Political Subdivisions Tort Claims Act extends only to basic policy decisions made in governmental activity at the operational level, and not to ministerial activities implementing such policy decisions.
5. ____. The purpose of the discretionary function exception of the Political Subdivisions Tort Claims Act is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.
6. ____. To determine whether the discretionary function exception of the Political Subdivisions Tort Claims Act applies, the Nebraska Supreme

Court has set out a two-step analysis. First, a court must consider whether the action is a matter of choice for the acting employee. Second, if the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.

7. ____. The discretionary function exception of the Political Subdivisions Tort Claims Act does not apply when the governmental entity has a nondiscretionary duty to warn or take other protective measures that may prevent injury as the result of the dangerous condition or hazard.
8. **Political Subdivisions: Negligence.** A nondiscretionary duty to warn or take other protective measures exists when (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard.

Appeal from the District Court for Washington County: John E. Samson, Judge. Affirmed.

David A. Domina and Christian T. Williams, of Domina Law Group, P.C., L.L.O., for appellant.

Robert S. Keith and Philip O. Cusic, of Engles, Ketcham, Olson & Keith, P.C., for appellee Washington County.

Tiernan T. Siems and Karen M. Keeler, of Erickson & Sederstrom, P.C., for appellee Martin Marietta Materials, Inc.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

## NATURE OF CASE

This case involves a wrongful death action brought against Washington County (the County) for the death of James E. McGauley, a quarry worker who was killed while operating a dump truck on a road being built up by his employer, Martin Marietta Materials, Inc. (Marietta), on behalf of the County. The issue concerns whether the County had

sovereign immunity under the discretionary acts exclusion of the Political Subdivisions Tort Claims Act (PSTCA).[1]

## FACTS

On May 31, 2011, the State of Nebraska and the Washington County Highway Superintendent (the Superintendent) declared a disaster because of severe flooding from the Missouri River. The County assigned the majority of its road construction staff to build a road providing access to a residential subdivision, while the remaining staff assisted with general measures to mitigate flood damage in the area. On June 3, the County formed an emergency flood subcommittee (the Subcommittee).

Marietta operated the only quarry in the County, and in early June 2011, the Army Corps of Engineers informed Marietta that the quarry was in imminent danger of flooding. County-owned road CR P30 was the only access road to the quarry for truck traffic. CR P30 allowed Marietta to provide quarry materials to combat the flooding in other parts of the County. This road, nearly a mile long, provided a barrier between the floodwaters and the quarry. Unless the road were raised or some other action were taken, floodwaters would overtake the quarry, halting any work there.

On June 6, 2011, a representative of Marietta contacted the Superintendent, seeking permission to raise the height of CR P30. The Superintendent gave permission to undertake the project but advised the representative that the Subcommittee would have to approve it. Later that day, the Subcommittee met. Because the County lacked the resources and equipment to raise the road, the Subcommittee granted Marietta an oral easement to raise the road. A formal easement and an indemnification agreement were signed on June 13.

At the bench trial, members of the Subcommittee testified that they orally agreed to allow Marietta to take on the

[1] Neb. Rev. Stat. § 13-910(2) (Reissue 2012).

project under the express condition that Marietta accept full responsibility. However, Marietta's representative denied any discussion of liability.

CR P30's construction was subject to Mine Health Safety Administration regulations. Marietta had experience building roads to those regulations' standards within its quarry. To comply with the standards, Marietta took numerous safety precautions, including installing lights to provide partial illumination in the dark, placing 3-foot berms (raised rows of gravel and dirt) on each side of the road to warn drivers where the soft shoulder of the road began, and holding daily safety meetings before each shift. At the daily safety meetings, Marietta drivers were advised that the softness of the shoulders increased the probability of collapse. They were told to stay off the shoulders and to approach the berms slowly.

McGauley's accident occurred around 4:45 a.m. on June 9, 2011. By June 9, the road had been built 6 to 7 feet. While backing up to dump a load of rock, McGauley drove off the road onto the shoulder. The shoulder collapsed, and the truck flipped upside down into the floodwaters below. McGauley drowned. Because of the work being conducted on that part of road, there was no berm where McGauley's accident occurred.

The County was not involved in the effort to build up CR P30. No one from the County provided instruction, assistance, or supervision. Following the June 6, 2011, meeting wherein the County granted the oral easement for Marietta to build up CR P30, the Superintendent considered the matter "out of [her] hands." Nevertheless, she admitted that the County remained responsible for maintaining CR P30. She acknowledged that the County had previously exercised its municipal authority to clarify that it controlled CR P30 to Marietta's predecessor.

At trial, the Superintendent testified that she visited the worksite twice and recognized that the construction of CR P30 did not meet County standards. She also testified that a road

foreman for the County went to the worksite to observe, but that she did not send him and he was not involved in the work. The Superintendent testified that the County did not put any lighting, warning signs, or reflective delineators on the worksite during the week of June 6, 2011.

After McGauley's death, the personal representative of his estate, Dawn McGauley, brought a wrongful death action against Marietta and the County. The County raised sovereign immunity as an affirmative defense and brought a cross-claim against Marietta. After a bench trial exclusively on the issue of sovereign immunity, the district court ruled that the discretionary function exception of the PSTCA applied, and therefore, the County had sovereign immunity. The district court dismissed the County's cross-claim against Marietta. The personal representative of McGauley's estate now appeals.

## ASSIGNMENT OF ERROR

The personal representative of McGauley's estate assigns, combined and restated, that the district court erred in dismissing her claims against the County on the ground that the County was protected by sovereign immunity.

## STANDARD OF REVIEW

[1] A district court's findings of fact in a proceeding under the PSTCA will not be set aside unless such findings are clearly erroneous.[2]

[2] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

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[2] See *Mix v. City of Lincoln*, 244 Neb. 561, 508 N.W.2d 549 (1993).

[3] *Cotton v. State*, 281 Neb. 789, 810 N.W.2d 132 (2011).

## ANALYSIS

[3] The PSTCA provides limited waivers of sovereign immunity, which are subject to statutory exceptions.[4] If a statutory exception applies, the claim is barred by sovereign immunity.[5]

[4,5] Here, we are concerned with the statutory exception provided by § 13-910(2), which is commonly known as the discretionary function exception. Under that exception, the PSTCA shall not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused."[6] We have said that the discretionary function exception extends only to basic policy decisions made in governmental activity at the operational level, and not to ministerial activities implementing such policy decisions.[7] The purpose of the discretionary function exception is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.[8]

[6] To determine whether the discretionary function exception applies, we have set out a two-step analysis.[9] First, the court must consider whether the action is a matter of choice for the acting employee.[10] Second, if the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the

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[4] *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

[5] *Id.*

[6] § 13-910(2).

[7] See *Shipley, supra* note 4.

[8] *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015).

[9] *Id.*

[10] *Id.*

kind that the discretionary function exception was designed to shield.[11]

[7,8] Here, a third step is also involved. The personal representative of McGauley's estate contends that the County had a nondiscretionary duty to provide a safe work environment. We have held that the discretionary function exception does not apply when the governmental entity has a "'nondiscretionary duty to warn . . . or take other protective measures that may prevent injury as the result of the dangerous condition or hazard.'"[12] Such a duty exists when

> "(1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard . . . ."[13]

Turning to the first step in determining whether the discretionary function exception applies, we conclude that the challenged conduct at issue here involves an element of judgment at the policymaking level. When confronted with the emergency situation of the flooding, and in light of its lack of resources, the County was effectively forced to choose between two less-than-ideal options: It could either (1) allow CR P30 to flood and Marietta to go out of business or (2) grant Marietta an easement and allow Marietta to use its resources to build up CR P30. The County chose the latter option.

Turning to the second step, we conclude that the judgment discussed above is clearly the kind that the discretionary function exception was designed to shield. The County's decision to allow Marietta to build up CR P30 involved balancing the competing needs of commerce, retaining access to supplies needed to combat the flood in other areas, and flood

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[11] *Id.*

[12] *Shipley, supra* note 4, 283 Neb. at 846, 813 N.W.2d at 466.

[13] *Id.* at 845-46, 813 N.W.2d at 465-66.

and road safety—all of which the County had to balance in light of the emergency situation and its limited resources. This decision was clearly the type of economic, political, and social policy judgment that the discretionary function exception was designed to shield.[14]

Although the personal representative of McGauley's estate concedes that the decision to allow Marietta to build up the road was a judgment that fell within the discretionary function exception to the PSTCA, she argues that the County's decisions not to supervise Marietta's work and not to enforce its own safety standards on Marietta were separate judgments that did not fall within the exception. We disagree.

The district court found, and the evidence supports, that the County did not have the resources to assist Marietta with the buildup. Supervising Marietta's work and enforcing its own safety standards on Marietta were simply not options for the County. Thus, to the extent that any *decision* was made not to supervise Marietta or enforce safety standards, it was part of the County's overall policymaking decision to allow Marietta to build up the road. Accordingly, the argument of the personal representative of McGauley's estate that these decisions were separate, nondiscretionary judgments is without merit.

Finally, we turn to the third step in our analysis: whether the County had a nondiscretionary duty to provide a safe working environment on CR P30. As noted above, a nondiscretionary duty to warn or take other protective measures exists when (1) the governmental entity has notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons likely to be injured by the dangerous condition.

Here, such a duty does not exist, because regardless of whether the first element was met, the district court found and

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[14] See *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002).

we agree that the second element was clearly not met: The dangerous conditions present on CR P30 were not readily apparent to persons likely to be injured, i.e., the construction workers. As the district noted, Marietta workers were the persons likely to be injured by the dangerous conditions, and Marietta warned its workers of those conditions at safety meetings on several occasions prior to McGauley's accident. The evidence shows that at the safety meetings, drivers such as McGauley were specifically warned to stay off the soft shoulders and to approach them slowly. The workers were also trained to operate the heavy equipment safely, including driving slowly when required, using signals to communicate with other operators, and keeping proper lookout for hazards.

McGauley was also personally aware of the dangerous conditions. Not only had McGauley backed up and unloaded his dump truck dozens of times already on CR P30, but McGauley had attended the safety meetings where the warnings were given. The district court found that on the morning of the accident, McGauley had attended a safety meeting, wherein he was warned to keep equipment in the center of the road.

Given the evidence set forth above, the district court found that "the dangerous conditions presented by the CR P30 construction project . . . were readily apparent to the . . . Marietta workers, including . . . McGauley." Because of the evidence supporting this factual finding, we cannot say that such finding was clearly erroneous. Therefore, the County did not have a nondiscretionary duty to take protective measures, and McGauley's assignment of error is without merit.

## CONCLUSION

We find that the County's decision to allow Marietta to build up the road was a discretionary function, not subject to the PSTCA. Therefore, the County has sovereign immunity, and the district court's order dismissing McGauley's claims against it is hereby affirmed.

Affirmed.

Nebraska Supreme Court
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# Erin W., appellee, v. Charissa W., appellant.

897 N.W.2d 858

Filed July 7, 2017. No. S-16-958.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Evidence: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Parent and Child: Paternity: Presumptions.** Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2016), a child born during a marriage relationship is presumed to be the husband's child.
4. **Parent and Child: Paternity: Presumptions: Evidence.** The statutory presumption of legitimacy under Neb. Rev. Stat. § 42-377 (Reissue 2016) may be rebutted only by clear, satisfactory, and convincing evidence.
5. ____: ____: ____: ____. The testimony or declaration of a husband or wife is not competent to overcome the presumption of legitimacy under Neb. Rev. Stat. § 42-377 (Reissue 2016).
6. **Parent and Child: Paternity: Presumptions.** The presumption of legitimacy was intended to protect innocent children from the stigma attached to illegitimacy and to prevent case-by-case determinations of paternity.
7. **Divorce: Paternity: Presumptions: Evidence.** When the parties fail to submit evidence at the dissolution proceeding rebutting the presumption

of legitimacy, the dissolution court can find paternity based on the presumption alone.

8. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
9. ____. A trial court cannot commit error in resolving an issue never presented and submitted to it for disposition.
10. **Divorce: Paternity: Statutes.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2016) appears in a series of statutes dealing with paternity of children born out of wedlock, but it also applies to adjudicated fathers of children born during a marriage who are seeking to disestablish paternity after a dissolution decree.
11. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
12. **Child Custody.** Joint physical custody should be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.

Appeal from the District Court for Dodge County: Geoffrey C. Hall, Judge. Affirmed.

Melissa Lang Schutt, of Fornoff & Schutt, P.C., for appellant.

Shane J. Placek, of Sidner Law, for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

Charissa W. appeals from a decree of dissolution entered by the Dodge County District Court. Her assignments of error all center on the trial court's denial of her motions for court-ordered genetic testing, which she requested in an effort to rebut the presumption of legitimacy concerning a child born during the marriage. Our de novo review reveals no abuse of discretion, and we affirm.

## FACTS

Charissa and Erin W. were married in June 2013. Charissa was pregnant when the parties married. Before the wedding, Charissa told Erin the child might not be his. She explained that in addition to having intercourse with Erin, she also had intercourse with a man named "G.T." around the time the child was conceived.

Charissa and Erin married, and several months later, Charissa gave birth to a daughter. Based on the child's appearance at birth, Charissa and Erin believed Erin was her father and listed him as such on her birth certificate. As the child aged, her appearance led Charissa to suspect Erin was not her biological father.

The parties separated in September 2014. One year later, Erin filed a complaint for dissolution of marriage in the Dodge County District Court. Shortly after the dissolution action was filed, Charissa filed a motion for genetic testing seeking "an order requiring [Erin] and [Charissa] to participate in genetic testing to determine the paternity of [the child]." Charissa's motion for genetic testing did not cite or rely upon any particular authority.

Erin responded by filing what he termed "Plaintiff's Resistance to Defendant's Motion for Genetic Testing." In it, Erin asserted, among other things, that the child was born during the marriage and that he was presumed to be her father under Neb. Rev. Stat. § 42-377 (Reissue 2016).

After a hearing and briefing, the court overruled Charissa's motion for genetic testing. The court reasoned:

> [T]he child was born during the course of the marriage. [Erin] acknowledged paternity, has always held himself out to be the father of this child, and he resists [Charissa's] motion [for genetic testing]. [Charissa] placed [Erin's] name on the birth certificate and the parties were legally married prior to the child's birth confirming to the world that this child was their issue. Further, [Charissa] failed to challenge [Erin's] paternity

> of the child for a period of approximately two years. Finally, [Charissa] has failed or refused to name some other person that she alleges to be the purported father of the child.

The case proceeded to trial.

At trial, Charissa testified she began to question whether Erin was the child's father when, at 6 months of age, the child's appearance began to change. Charissa believed G.T. was the child's father based on the time of conception and the fact that G.T. has a son who "looks identical" to the child. Charissa was asked why she had not asked G.T. to submit to a private paternity test, and she replied, "I just [didn't] want him a part of [the child's] life. He hasn't been in [her] life since birth . . . ." Charissa also testified that she wanted to prove Erin was not the child's biological father so that Charissa's current boyfriend could eventually adopt her. When asked why she thought it was in the child's best interests to prove Erin was not her father, Charissa testified: "Well, when she gets older, she's going to ask questions, wondering why she [does not look like] both of us, and I just don't want to . . . I don't know, lessen the confusion."

At trial, Charissa took somewhat inconsistent positions regarding custody and child support. Regarding custody, she testified that "in the event that the Court finds [Erin] is the father," she was "agreeable to having the [court order] joint custody." But Charissa requested that if the court determined she had rebutted the presumption of legitimacy, the court award her full custody of the child, while still giving Erin overnight visitation every other weekend. Charissa asked that Erin be ordered to pay child support for the child regardless of whether the presumption of legitimacy was rebutted.

Erin testified that he never questioned whether he was the child's father and did not want genetic testing. Erin testified that he signed the child's birth certificate when she was born and has actively parented her ever since.

The evidence at trial showed that both Charissa and Erin held Erin out as the child's father and that Erin was actively involved in her upbringing. He changed her diapers, fed her, bathed her, and put her to sleep. He provided financial assistance, child care, and health insurance for her. When the parties separated in 2014, they agreed to share parenting time by exchanging the child every 2 to 3 days. After the dissolution action was filed in 2015, the parties agreed to the entry of a temporary order that granted them joint legal and physical custody of the child and equal parenting time on an alternating 5-day schedule. Charissa testified that Erin was a good father, loved the child, and provided appropriate care for her.

During trial, Charissa renewed her request for genetic testing, again without citation to any particular statute. The court again overruled the motion for the reasons set out in its earlier order.

After trial, the court entered a decree that found Charissa had not rebutted the statutory presumption of legitimacy, and the court made an express finding that Erin was the child's father. The court awarded the parties joint legal and physical custody of the child and adopted Erin's proposed parenting plan, which continued the same alternating 5-day parenting schedule the parties had followed throughout the pendency of the divorce. Erin was ordered to pay child support in the amount of $198 per month.

Charissa timely appealed, and we moved the case to our docket on our own motion pursuant to our statutory authority to regulate the dockets of the appellate courts of this state.[1]

## ASSIGNMENTS OF ERROR

Charissa assigns, restated, that the district court erred in (1) denying her requests for court-ordered genetic testing,

[1] *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001).

(2) finding the presumption of legitimacy was not rebutted by the evidence presented, and (3) ordering joint custody of the child despite evidence that Erin is not her biological father.

## STANDARD OF REVIEW

[1,2] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.[2] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[3]

## ANALYSIS

[3] Under Nebraska common law, later embodied in § 42-377, a child born during a marriage relationship is presumed to be the husband's child. Section 42-377 provides in relevant part: "Children born to the parties, or to the wife, in a marriage relationship . . . shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown."

[4-7] The statutory presumption of legitimacy may be rebutted only by clear, satisfactory, and convincing evidence.[4] This court has long held that the testimony or declaration of a husband or wife is not competent to overcome this presumption.[5]

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[2] *Donald v. Donald*, 296 Neb. 123, 892 N.W.2d 100 (2017).

[3] *Id.*

[4] See *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[5] *Id.*; *Helter v. Williamson*, 239 Neb. 741, 478 N.W.2d 6 (1991); *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985); *Perkins v. Perkins*, 198 Neb. 401, 253 N.W.2d 42 (1977).

We have reasoned that "'"[t]he presumption [of legitimacy] was intended to protect innocent children from the stigma attached to illegitimacy and to prevent case-by-case determinations of paternity. . . ."'"[6] When the parties fail to submit evidence at the dissolution proceeding rebutting the presumption of legitimacy, the dissolution court can find paternity based on the presumption alone.[7]

## Denial of Genetic Testing Was Not Abuse of Discretion

Charissa sought to overcome the statutory presumption that Erin is the child's father by asking the court to compel genetic testing, against Erin's wishes. And although she sought to rebut Erin's presumed paternity, she did not seek to establish paternity in another man. Simply put, Charissa sought to illegitimize the child through court-ordered genetic testing, and Erin opposed such testing. The question presented is whether, under these circumstances, the district court abused its discretion in denying Charissa's motions for court-ordered testing.

We begin by noting that Charissa's motions for genetic testing were not premised on any particular statute or discovery rule. However, in her briefing to this court, Charissa argues the district court should have granted her motions under either Neb. Rev. Stat. § 43-1412.01 (Reissue 2016) or Neb. Rev. Stat. § 43-1414 (Reissue 2016).

[8,9] Our de novo review of the record shows Charissa relied to some extent on § 43-1412.01 at trial, so we will address the applicability of that statute on appeal. But we can find nothing in the record indicating Charissa ever relied on § 43-1414 as support for her motions to order genetic testing. An appellate court will not consider an issue on appeal that

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[6] *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 863, 573 N.W.2d 425, 434 (1998).

[7] *Stacy M. v. Jason M.*, 290 Neb. 141, 858 N.W.2d 852 (2015).

was not presented to or passed upon by the trial court.[8] This is because the trial court cannot commit error in resolving an issue never presented and submitted to it for disposition.[9] Because Charissa never presented the issue to the trial court, we decline to address whether § 43-1414 has any application on these facts.

[10] Section 43-1412.01 is the statute governing disestablishment of paternity. It provides in relevant part:

> An individual may file a complaint for relief and the court may set aside a final judgment . . . or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination.

Even though § 43-1412.01 appears in a series of statutes dealing with paternity of children born out of wedlock, we have expressly held that § 43-1412.01 also applies to adjudicated fathers of children born during a marriage who are seeking to disestablish paternity after a dissolution decree.[10]

In this case, Charissa sought to rely upon § 43-1412.01 before a decree had been entered. But the disestablishment provisions of § 43-1412.01 presuppose a legal determination of paternity and are not applicable until after a final judgment or other legal determination of paternity has been entered. The provisions of § 43-1412.01 were inapplicable prior to the decree and did not require the district court to order genetic testing.

Charissa's motions for court-ordered genetic testing were not premised on any applicable statutory provisions or discovery rules. As observed earlier, Charissa was requesting court-ordered testing in an effort to illegitimize a child born during the marriage without establishing paternity in another,

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[8] *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009).

[9] *Id.*

[10] *Stacy M. v. Jason M., supra* note 7.

and Erin opposed such testing. Under these circumstances, we find no abuse of discretion in the trial court's decision to overrule Charissa's motions for genetic testing. Her first assignment of error has no merit.

### Presumption of Legitimacy Was Not Rebutted at Trial

Charissa next argues that even in the absence of genetic testing, "she has successfully rebutted th[e] presumption" that Erin is the child's father.[11] We disagree.

As noted earlier, the statutory presumption of legitimacy may be rebutted only by clear, satisfactory, and convincing evidence.[12] The testimony or declaration of a husband or wife is not competent to overcome this presumption.[13] And when the parties fail to submit competent evidence at the dissolution proceeding sufficient to rebut the presumption of paternity, the dissolution court can find paternity based on the presumption alone.[14]

Charissa's evidence at trial consisted of her own testimony that she had intercourse with G.T. around the time the child was conceived and photographs purporting to show the change in the child's appearance over time and similarity in appearance to G.T.'s son. The district court found that G.T. was not called to testify and that Charissa's uncorroborated testimony was not competent under our case law. It further found that the photographs of the child were not sufficient to rebut the presumption that Erin was her father.

Our de novo review convinces us the district court correctly found that the evidence at trial was not sufficient to rebut the presumption of legitimacy. Charissa's uncorroborated testimony of G.T.'s paternity is not competent evidence, and

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[11] Brief for appellant at 17.

[12] *Alisha C. v. Jeremy C., supra* note 4.

[13] *Id.*

[14] *Id.*

the only other evidence offered on the issue—photographs purporting to show the child's change in appearance and her physical similarity to G.T.'s son—was not sufficiently convincing to rebut the statutory presumption. Charissa's second assignment of error lacks merit.

## No Abuse of Discretion in Awarding Joint Custody

In her final assignment of error, Charissa asserts the district court erred in awarding Charissa and Erin joint legal and physical custody of the child. Her argument is largely a reiteration of her nonmeritorious claim that the court erred in not compelling Erin to submit to genetic testing. Our de novo review of the record reveals no abuse of discretion in the court's joint custody award.

[11,12] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.[15] We have held that joint physical custody should be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.[16]

During the pendency of this divorce action, Charissa and Erin agreed to the entry of a temporary order granting them joint legal and physical custody of the child and providing equal parenting time on an alternating 5-day schedule. The parties operated successfully under this joint custody arrangement for nearly a year, and there is nothing in the record

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[15] *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

[16] *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

suggesting the parties or the child experienced difficulty with the arrangement. The parenting plan ultimately adopted by the district court and included in the decree continued the same joint custody and the same parenting time schedule the parties had agreed to previously; the court expressly found the plan was in the child's best interests.

At trial, Charissa testified that Erin was a good father, loved the child, and provided appropriate care for her. She further conceded that if the court were to find she had failed to overcome the presumption of Erin's paternity, she was "agreeable to having the [court order] joint custody."

On this record, we find no abuse of discretion in the district court's decision to award joint custody. Charissa's third assignment of error is meritless.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Shawn L. Cross, appellant.

900 N.W.2d 1

Filed July 14, 2017. No. S-16-376.

1. **Criminal Law: Motions for New Trial: Evidence: Appeal and Error.** A de novo standard of review applies when an appellate court is reviewing a trial court's dismissal of a motion for a new trial under Neb. Rev. Stat. § 29-2102(2) (Reissue 2016) without conducting an evidentiary hearing. But a trial court's denial of a motion for new trial after an evidentiary hearing is reviewed for an abuse of discretion.
2. **Criminal Law: Motions for New Trial: Evidence: Time.** When a motion for new trial is filed more than 5 years after the date of the verdict, there are two requirements that must be satisfied for the motion to be timely under Neb. Rev. Stat. § 29-2103(4) (Reissue 2016): First, the motion and supporting documents must show the new evidence could not with reasonable diligence have been discovered and produced at trial. Second, the evidence must be so substantial that a different result may have occurred.
3. ____: ____: ____: ____. The timeliness requirements under Neb. Rev. Stat. § 29-2103(4) (Reissue 2016) may be considered in any order, but unless both requirements are satisfied, a motion for new trial based on newly discovered evidence cannot be filed more than 5 years after the date of the verdict.

Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Affirmed.

Shawn L. Cross, pro se.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Miller-Lerman, Stacy, Kelch, and Funke, JJ.

Stacy, J.

More than 5 years after his conviction, Shawn L. Cross filed a motion for new trial, pursuant to Neb. Rev. Stat. § 29-2101(5) (Reissue 2016), claiming newly discovered evidence. The district court dismissed the motion without a hearing, pursuant to Neb. Rev. Stat. § 29-2102(2) (Reissue 2016). Cross appeals, and we affirm.

## I. FACTS

In 2009, Cross was charged with second degree assault and use of a weapon to commit a felony for allegedly beating Pedro Pacheco with a baseball bat.[1] Before trial, Cross' appointed counsel, Richard DeForge, was allowed to withdraw based on a conflict of interest. The conflict was that DeForge was already representing Elgie Iron Bear, who was listed as a witness in Cross' case. Cross was appointed new counsel. Several months later, new counsel was also permitted to withdraw, after which DeForge was reappointed to represent Cross. The record shows the reappointment of DeForge occurred because, by that point, the case involving Iron Bear was closed and DeForge no longer had a conflict of interest. DeForge thereafter represented Cross at trial and on his direct appeal.

The case was tried to a jury in March 2010, and Cross was convicted of both charges. The court subsequently found Cross was a habitual criminal[2] and sentenced him to imprisonment for a total of 20 to 25 years. Cross' convictions and sentences were summarily affirmed by the Nebraska Court of Appeals.[3]

In 2011, Cross filed a pro se motion for postconviction relief. In it, he raised claims of ineffective assistance of counsel,

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[1] See Neb. Rev. Stat. §§ 28-309 and 28-1205(1)(b) (Reissue 2016).

[2] Neb. Rev. Stat. § 29-2221 (Reissue 2016).

[3] *State v. Cross*, 18 Neb. App. lxxxv (No. A-10-426, Nov. 15, 2010).

including a claim that DeForge had a conflict of interest based on the Iron Bear representation. Cross was appointed new postconviction counsel, and an evidentiary hearing was held. The district court denied postconviction relief, and the Court of Appeals summarily affirmed.[4]

In December 2015, Cross filed a pro se motion for new trial pursuant to § 29-2101(1), (2), (4), and (5). The district court found that to the extent Cross sought a new trial based on the grounds set forth in subsections (1), (2), and (4) of § 29-2101, the motion was filed more than 10 days after the verdict and was untimely under Neb. Rev. Stat. § 29-2103(3) (Reissue 2016). The court also found Cross was not entitled to a new trial based on newly discovered evidence under § 29-2101(5), because his motion and supporting documents failed to set forth sufficient facts. The district court dismissed the motion without conducting an evidentiary hearing.[5] Cross did not appeal.

In March 2016, Cross filed another motion for new trial, again claiming newly discovered evidence under § 29-2101(5). The allegations of the second motion, which we address in more detail in our analysis, were substantially similar to those found insufficient in his first motion. As it had done previously, the court examined the motion and supporting documents, concluded they failed to set forth sufficient facts, and dismissed the motion without conducting an evidentiary hearing.[6]

Cross timely appealed from the dismissal of his second motion for new trial. We moved the case to our docket on our own motion[7] to address the impact of recent legislative amendments to the new trial statutes at issue.[8]

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[4] *State v. Cross*, 20 Neb. App. xxviii (No. A-12-188, Oct. 10, 2012).

[5] See § 29-2102(2).

[6] *Id.*

[7] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[8] See 2015 Neb. Laws, L.B. 245, amending §§ 29-2102 and 29-2103.

## II. ASSIGNMENTS OF ERROR

Cross assigns, restated, that the district court erred in (1) failing to apply the correct standard of review to his motion based on newly discovered evidence, (2) failing to hold an evidentiary hearing, and (3) denying his motion for new trial without addressing his conflict of interest allegation.

## III. ANALYSIS

### 1. Statutory Framework

In criminal cases, motions for new trial are governed by §§ 29-2101, 29-2102, and 29-2103. In 2015, the Legislature amended §§ 29-2102 and 29-2103,[9] and this is our first opportunity to interpret and apply those amendments. We begin by providing an overview of the statutory scheme.

Section 29-2101 sets out the seven grounds on which a motion for new trial may be based; only § 29-2101(5) is relevant to this case. Pursuant to that subsection, a new trial may be granted based on "newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial."[10] A new trial may be granted only if the ground materially affects the defendant's substantial rights.[11]

Section 29-2103 sets out how and when motions for new trial must be presented. It requires all such motions to be "made by written application" and to "state the grounds under section 29-2101 which are the basis for the motion."[12] Additionally, § 29-2103(2) requires the motion to "be supported by evidence as provided in section 29-2102." The statutory timeframe for filing a motion for new trial varies depending on the ground asserted.[13]

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[9] *Id.*

[10] § 29-2101(5).

[11] § 29-2101.

[12] § 29-2103(1) and (2).

[13] Compare § 29-2103(3), (4), and (5).

Prior to August 30, 2015, a motion based on newly discovered evidence had to be filed within 3 years of the verdict.[14] Effective that date, however, the Legislature amended §§ 29-2102 and 29-2103.[15] Now, a motion for new trial alleging newly discovered evidence must be filed "within a reasonable time after the discovery of the new evidence" and "cannot be filed more than five years after the date of the verdict, unless the motion and supporting documents show the new evidence could not with reasonable diligence have been discovered and produced at trial and such evidence is so substantial that a different result may have occurred."[16] Both of Cross' motions for new trial were filed after the effective date of the amendments and more than 5 years after the date of the verdict.

Section 29-2102 sets out what evidence must accompany a motion for new trial. The type of necessary evidence varies depending on which ground for new trial is relied upon.[17] As relevant here, a motion for new trial based on newly discovered evidence under § 29-2101(5) "shall be supported by evidence of the truth of the ground in the form of affidavits, depositions, or oral testimony."[18]

Prior to the amendments made by L.B. 245, the new trial statutes did not directly address when a court was required to hold an evidentiary hearing on a motion. But as amended, § 29-2102(2) now dictates both when a hearing is required and when a motion may be dismissed without a hearing:

> If the motion for new trial and supporting documents fail to set forth sufficient facts, the court may, on its own motion, dismiss the motion without a hearing. If the motion for new trial and supporting documents set forth

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[14] § 29-2103(4) (Reissue 2008).

[15] 2015 Neb. Laws, L.B. 245.

[16] § 29-2103(4) (Reissue 2016).

[17] § 29-2102(1).

[18] *Id.*

> facts which, if true, would materially affect the substantial rights of the defendant, the court shall cause notice of the motion to be served on the prosecuting attorney, grant a hearing on the motion, and determine the issues and make findings of fact and conclusions of law with respect thereto.

The district court relied on the new provisions of § 29-2102(2) to dismiss Cross' second motion for new trial without a hearing. We note that, unlike motions for postconviction relief, the statutes governing motions for new trial contain no express limitation on successive motions.[19] As such, although the district court noted Cross had filed successive motions for new trial raising substantially the same grounds, it did not dismiss the second motion on that basis, and instead proceeded to analyze the second motion under the applicable new trial statutes.

### 2. Standard of Review

We have not yet determined the standard of review to be applied when an appellate court reviews a trial court's dismissal of a motion for a new trial under § 29-2102(2) without conducting an evidentiary hearing. Historically, a trial court's order denying a motion for new trial has been reviewed for an abuse of discretion.[20] We have accorded trial judges significant discretion in granting or denying a motion for new trial, because the trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict.[21]

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[19] Compare § 29-2101 et seq., with Neb. Rev. Stat. § 29-3001(3) (Reissue 2016) ("[t]he court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner"). See, also, *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

[20] See, e.g., *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015); *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

[21] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

But we are persuaded that a different standard of review should be applied when a motion for new trial is denied without an evidentiary hearing under § 29-2102(2). In such a situation, the role of the trial judge is to examine the motion and supporting documents to determine whether they set forth sufficient facts which, if true, "would materially affect the substantial rights of the defendant."[22] A trial judge undertakes a similar review process in postconviction proceedings, so we look to our jurisprudence in that area for guidance.

Nebraska's postconviction statutes allow a prisoner in custody under sentence to move for relief on the ground there was such a denial or infringement of the prisoner's constitutional rights as to render the judgment void or voidable.[23] "Unless the motion and the files and records of the case show . . . that the prisoner is entitled to no relief," the court must hold an evidentiary hearing.[24] Based on this language, we have held that a trial court must review a postconviction motion to determine whether it contains sufficient allegations which, if true, demonstrate a violation of the defendant's constitutional rights.[25] If the trial court finds that the allegations are not sufficient to meet this standard or that the files and records affirmatively show the defendant is not entitled to postconviction relief, it may deny relief without conducting an evidentiary hearing. If the defendant appeals, we review the trial court's determination de novo.[26]

As noted, § 29-2102(2) authorizes the trial court to dismiss a motion for new trial without conducting an evidentiary hearing "[i]f the motion for new trial and supporting documents fail to set forth sufficient facts." This statutory language is similar to the language the Legislature used in the

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[22] § 29-2102(2).

[23] § 29-3001.

[24] § 29-3001(2).

[25] See *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015).

[26] See, *id.*; *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

postconviction act.[27] Moreover, the nature of the trial court's review of motions for postconviction relief and motions for new criminal trials are similar. Indeed, the legislative history of § 29-2102(2) suggests the Legislature intended the new prehearing review process applicable to motions for new trial to be similar to the prehearing review process applied in postconviction actions.[28]

[1] For these reasons, we determine a de novo standard of review should apply when an appellate court is reviewing a trial court's dismissal of a motion for a new trial under § 29-2102(2) without conducting an evidentiary hearing. We will continue to apply the abuse of discretion standard of review to appeals from motions for new trial denied after an evidentiary hearing.

### 3. Timeliness of Motion for New Trial Based on Newly Discovered Evidence

[2,3] We begin by considering whether Cross' motion is timely under § 29-2103. Where, as here, the motion for new trial is filed more than 5 years after the date of the verdict, there are two requirements that must be satisfied for the motion to be timely under § 29-2103(4): First, the motion and supporting documents must show the new evidence could not with reasonable diligence have been discovered and produced at trial. Second, the evidence must be so substantial that a different result may have occurred. These timeliness requirements may be considered in any order, but unless both requirements are satisfied, a motion for new trial based on newly discovered evidence "cannot be filed more than five years after the date of the verdict."[29]

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[27] § 29-3001(2).

[28] See Floor Debate, L.B. 245, 104th Leg., 1st Sess. 13-14 (Mar. 12, 2015) (remarks of Senator Burke Harr).

[29] § 29-2103(4).

Cross' motion for new trial asserts three general grounds of newly discovered evidence. We address each in turn.

(a) Testimony of Cross' Aunt

First, Cross alleges that a prosecutor tampered with a trial witness, Cross' aunt, and that she testified falsely as a result. In support of this ground, Cross attached to his motion a handwritten letter dated "1-21-15" and signed "Your Aunt . . . ." The letter states in pertinent part:

> I didn[']t want to testify . . . against you and I told [the prosecutor] that but he had the court [subpoena] me anyway. I told him I didn't see anything that happened that [night], I only heard and he used that. He said I should testify [because] he knows I have children that get in trouble a lot and he would make the courts make it hard for them . . . . I was so scared of him . . . . I guess I didn't want to testify but he forced me to. He came to pick me up at my house in his car and would question me on the way.

This letter is not the type of supporting evidence permitted by § 29-2102(1), which requires that grounds of newly discovered evidence "shall be supported by evidence of the truth of the ground in the form of affidavits, depositions, or oral testimony." But even if the information in the letter had been presented in a permissible form, it would not support Cross' claim that his aunt testified falsely. At best, it shows she testified reluctantly. Moreover, neither the motion nor the supporting documents show that the information in the letter could not have been discovered and presented at trial with reasonable diligence. Our de novo review shows Cross failed to meet the first requirement of § 29-2103(4), and therefore the district court properly found his motion was not timely on this ground and dismissed it without conducting an evidentiary hearing. Because we conclude the first requirement was not met, we need not determine whether

the evidence was so substantial that a different result may have occurred.[30]

(b) Testimony of Pacheco

Cross' second claim of newly discovered evidence relates to the testimony of the assault victim, Pacheco. Cross alleges both that Pacheco's trial testimony was false and that Pacheco should not have been permitted to testify, because he was in the country illegally. In support of these allegations, Cross attached transcribed portions of Pacheco's 2009 deposition testimony, wherein he admits being in the United States without a visa or "papers."

Again, Cross has failed to meet the first requirement of § 29-2103(4). Section 29-2103(4) requires that the evidence relied upon be "new evidence." The 2009 deposition was taken before trial and is not new evidence. Nor, in any event, is the evidence so substantial that a different result might have occurred. Cross' second ground for new trial fails to satisfy either requirement under § 29-2103(4), and is time barred.

(c) DeForge Conflict of Interest

Cross' third and final allegation of newly discovered evidence relates to the conflict of interest DeForge had during his early representation of Cross. Cross concedes in his motion that he has raised this issue before, but suggests that "[i]t doesn't matter." We disagree. The motion and supporting documents reveal no "new evidence" regarding the conflict of interest. To the contrary, the record indicates Cross raised the same conflict of interest issue before trial, on direct appeal, in his motion for postconviction relief, and in his first motion for new trial. Absent some "new evidence" that could not with reasonable diligence have been discovered and presented at trial, Cross cannot bring a motion for new

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[30] See, *State v. Draper, supra* note 20; *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013).

trial based on this ground more than 5 years after the date of his verdict.

(d) Summary

Cross' second motion for new trial and supporting documents fail to set forth sufficient facts to show any of the grounds he alleges were timely filed under § 29-2103(4). As such, dismissal of the motion without a hearing was proper under § 29-2102(2), and Cross' assignments of error to the contrary are without merit.

## IV. CONCLUSION

We conclude the proper standard of review to apply when reviewing a trial court's dismissal of a motion for a new trial under § 29-2102(2) without conducting an evidentiary hearing is de novo on the record. Our de novo review of Cross' motion and supporting documents demonstrates that he has failed to satisfy the timeliness requirements of § 29-2103(4) and that dismissal of the motion without a hearing was proper under § 29-2102(2). We affirm the order dismissing his motion for new trial without a hearing.

Affirmed.

Cassel, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Matthew Landrum et al., appellants and cross-appellees, v. City of Omaha Planning Board et al., appellees and cross-appellants, and Daryl Leise et al., appellees.

899 N.W.2d 598

Filed July 14, 2017. No. S-16-383.

1. **Ordinances: Appeal and Error.** Interpretation of a municipal ordinance is a question of law, on which an appellate court reaches an independent conclusion irrespective of the determination made by the court below.
2. **Administrative Law: Appeal and Error.** In reviewing a decision based on a petition in error, an appellate court determines whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
4. **Jurisdiction: Standing.** The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
5. **Standing: Zoning.** It is generally held that an adjacent landowner has standing to object to the rezoning of property if such landowner shows some special injury separate from a general injury to the public.
6. **Municipal Corporations: Actions: Appeal and Error.** An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative power has been delegated, and the only remedy in such cases is by collateral attack, that is, by injunction or other suitable action.
7. **Municipal Corporations: Ordinances: Zoning.** A zoning ordinance constitutes the exercise of a governmental and legislative function, and a city council adopting a rezoning ordinance which amends a general zoning ordinance acts in a legislative capacity.

8. **Jurisdiction: Appeal and Error.** When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, the Supreme Court also lacks power to adjudicate the merits of the claim.
9. **Standing: Jurisdiction: Proof.** A party invoking a tribunal's jurisdiction has the burden to establish the elements of standing.
10. **Appeal and Error.** An issue not presented to the trial court may not be raised on appeal.
11. **Administrative Law: Evidence: Appeal and Error.** The reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact, and the evidence is sufficient to support an administrative agency's decision if the agency could reasonably find the facts as it did based on the testimony and exhibits contained in the record.
12. **Administrative Law: Due Process: Jurisdiction: Notice: Evidence: Appeal and Error.** A court reviewing an order of an administrative agency must determine whether there has been due process of law; and this includes an inquiry into the jurisdiction of the agency, whether there was reasonable notice and an opportunity for fair hearing, and whether the finding was supported by evidence.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed in part, and in part vacated and dismissed.

Rex J. Moats and Margaret A. McDevitt, of Moats Law Firm, P.C., L.L.O., for appellants.

Russell S. Daub for appellees Daryl Leise et al.

Alan M. Thelen, Deputy Omaha City Attorney, for appellees City of Omaha Planning Board et al.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

## I. INTRODUCTION

Matthew Landrum, Shandra Landrum, Rex Moats, Diane Moats, Edward Malesa, and Valerie Malesa (Homeowners) appeal the order of the district court for Douglas County that dismissed their amended petition in error. The Homeowners

sought to challenge a conditional use permit issued by the Omaha Planning Board (Planning Board) and a special use permit and rezoning granted by the Omaha City Council (City Council). The City of Omaha (City), the Planning Board, and the City Council cross-appeal, arguing that the Homeowners' petition in error was untimely and that the district court lacked subject matter jurisdiction. We dismiss for lack of jurisdiction that portion of the Homeowners' appeal concerning rezoning and a special use permit, and we vacate the corresponding portion of the district court's order. However, because the Planning Board acted within its jurisdiction, based its findings on sufficient evidence, and afforded the Homeowners due process, we affirm the district court's order in regard to the conditional use permit.

## II. BACKGROUND

### 1. Procedural Background

This appeal arises from permits and rezoning granted to Daryl Leise; Redbird Group, LLC; and Ray Anderson, Inc. (collectively the Developers), for a proposed convenience storage and warehouse facility to be constructed on real estate in the Omaha area (subject property). Ray Anderson, Inc., is the current owner of the subject property.

The City carries out its zoning powers through the enactment and enforcement of its zoning code, Omaha Municipal Code, chapter 55.

The Omaha Municipal Code designates various base zoning districts, including a "community commercial" (CC) district, which is the designation of the subject property. Omaha Mun. Code, ch. 55, art. VIII, § 55-362 (1980). Further, the code provides for a special "overlay district" that can be "overlaid" upon a property in addition to its base zoning district. Omaha Mun. Code, ch. 55, art. XI, § 55-682 (2007). One type of overlay district is the "major commercial corridor" (MCC) district, for which Leise applied in this case. See *id.* The zoning regulations enumerate various use types. For the

subject property, Leise sought the use types "[w]arehousing and distribution (limited)," see Omaha Mun. Code, ch. 55, art. III, § 55-49(h) (1980) (emphasis omitted), and "[c]onvenience storage," see Omaha Mun. Code, ch. 55, art. III, § 55-45(m) (2007) (emphasis omitted). The "[w]arehousing and distribution (limited)" use type is allowed subject to approval of a conditional use permit. Omaha Mun. Code, ch. 55, art. VIII, § 55-364(e) (2008). Similarly, a special use permit is required for convenience storage in the CC district. Omaha Mun. Code, ch. 55, art. VIII, § 55-365(c) (2008).

As noted above, Leise sought to place the subject property into the MCC overlay district while maintaining the base CC zoning district. Buildings built within the MCC overlay district are subject to certain urban design rules. See Omaha Mun. Code, ch. 55, art. XI, §§ 55-682 through 55-687 (2007), and Omaha Mun. Code, ch. 55, art. XXII, §§ 55-927 through 55-936 (2007). These urban design rules provide for enhanced regulation of screening, parking, site and building access, landscaping, and general building design guidelines. *Id.*

In sum, to proceed with the proposed project, the Omaha Municipal Code required three zoning approvals from the City: a conditional use permit, which could be issued by the Planning Board; a special use permit, which could be granted by the City Council after a recommendation by the Planning Board; and a rezoning, which could be granted by the City Council after a recommendation by the Planning Board, to place the subject property within the MCC overlay district. See Omaha Mun. Code, ch. 55, art. XX, § 55-883(h) and (k) (2008), § 55-884(g)(3) (2008), and § 55-886(f) and (g) (1980).

### 2. Municipal Proceedings

The subject property is a 4.75-acre vacant lot at the northeast corner of 204th Street (Highway 31) and Farnam Street, located near a residential area. Leise's statement of proposed use and plans for the subject property anticipated constructing

a three-story storage building, resembling an office building, with internal storage spaces. Leise also proposed constructing five single-story storage buildings with garage-type stalls. The storage facilities would contain 700 storage spaces for rental to customers, with estimated visits of two or three cars per hour.

Leise submitted a proposed concept design to the City's planning department. The concept design, dated February 17, 2015, provided preliminary specifications to demonstrate compliance with site development, landscaping, and buffer requirements for a CC property.

After reviewing the proposed concept design, the planning department issued a responsive letter, dated February 27, 2015. The planning department summarized the proposed project's classification and permit requirements under the Omaha Municipal Code.

The planning department scheduled the matter for a May 6, 2015, hearing before the Planning Board. On March 20, the planning department issued the following notice via a letter to residents near the proposed project site: "NOTICE OF REQUEST FOR: Approval of a Special Use Permit to allow Convenience storage and a Conditional Use Permit to allow Warehousing and distribution (limited) in a CC-Community Commercial District, with approval of an MCC-Major Commercial Corridor Overlay District." The notice further invited any interested persons to hear and comment on the proposal, which was on file at the planning department, and provided details about the approval procedure and hearing.

On April 6, 2015, Leise submitted a planning department zoning application form. The application form allowed the applicant to check boxes to select a special use permit, a conditional use permit, and "Other." Leise's application selected a special use permit and "Other," specifying "Adopt MCC Overlay District," but a conditional use permit was not selected. The application form provided basic factual information,

including the address and legal description of the subject property, its owner, the applicant, a contact person, and information on proposed building, parking, and landscaping. Leise incorrectly identified the property owner as "Ray Anderson c/o Anderson Food Shops," rather than "Ray Anderson, Inc." Leise listed himself as the applicant and contact person. There were illegible signatures on the lines designated for "Owner's Signature" and "Applicant Signature." Under the applicant's signature, the form states, "(If not the property owner, the applicant certificates [sic] with this signature to be the authorized agent of the property owner.)"

On April 29, 2015, the planning department issued a recommendation report that analyzed the proposed project in light of applicable portions of the Omaha Municipal Code. The report noted that the adjacent land use was primarily residential. It stated that before the City annexed the subject property and converted it to a CC district, it was originally zoned "C-3 Highway Commercial" by the City of Elkhorn, a designation which allowed warehousing and distribution as a permitted use. The report noted that conditionally, Leise's permit request was in substantial conformance with "the zoning ordinance" and the City's master plan. The report further evaluated the proposed uses pursuant to specific portions of Omaha Mun. Code, ch. 55, art. XX, § 55-885 (2008), which sets forth criteria for the review and evaluation of applications for conditional use permits and special use permits. It deduced that the proposed uses would comply with those criteria and that the economic impact on surrounding properties would be acceptable. The report recommended (1) approval of "the MCC-Major Commercial Overlay District," (2) approval of the special use permit to allow convenience storage in "a CC-MCC District" subject to plan revisions for compliance with zoning regulations, and (3) approval of the conditional use permit to allow "*Warehousing and distribution (limited)* in a CC-MCC District," subject to plan revisions for compliance with zoning regulations.

On May 5, 2015, residents near the subject property submitted to the Planning Board a "Petition" with 52 signatures, expressing opposition to the proposed project. Residents also submitted letters and email messages detailing the reasons for their opposition, which included safety risks, lack of sufficient buffer space from adjacent homes, increased risk of crime, excessive light from the development, lack of continuity with the adjacent homes, and adverse effects on property values.

The Planning Board held a public hearing on Leise's requests on May 6, 2015. Leise appeared and described the proposal. Several neighborhood opponents also spoke, including one of the Homeowners. Opponents generally expressed that they were not yet familiar with the plan. They opined that the structure would not "fit" with the nearby residential neighborhoods and may contribute to crime and obstruct views. A real estate broker with 14 years' experience and others stated that the structure would be detrimental to the neighboring residents' property values. Other concerns included lighting, safety, and compliance with the City's master plan. Some opponents stated that they had not been personally informed about the project and that they felt they had been "ambushed." Another complained that some residents near the proposed project site did not receive the notice of hearing from the Planning Board. The Planning Board laid over the case to allow Leise and the neighboring residents to meet and discuss the issues.

Leise submitted revised plans, and the City's planning department issued a revised recommendation report on July 29, 2015. The revised recommendation report found that the revised plans "addressed most of the conditions listed in the previous recommendation report." The report noted that the Developers needed to provide a floor plan for the indoor storage facility. Like the previous report, it provided a written analysis of the project in light of § 55-885 and concluded that other than a few conditions to address, "the proposed uses

will comply with all the applicable base district development standards and [are] consistent with the criteria in Section 55-885." The planning department added that "[t]he proposed uses are consistent with and carry out the goals and objectives of the City['s] Master Plan."

On August 5, 2015, the Planning Board conducted another hearing. The planning department again issued a notice letter regarding the proposed conditional use permit, special use permit, and rezoning. At the hearing, the Developers' attorney addressed issues including tree buffers, the "upgraded design," topography, compliance with size regulations, views from the exterior, security issues, and fencing and buffering. He also noted the meetings and contacts between Leise and the residential neighbors.

At the August 5, 2015, hearing, neighbors again expressed concerns about views from the exterior, lighting, the City's master plan, compatibility with the neighborhood, and safety. One of the Homeowners implied that demographically, owners of nearby starter homes valued at about $125,000 would be more likely to use the storage facility than homeowners like him with large homes valued at $400,000. Following these remarks, a board member advised the Homeowner and others present to be "very careful about generalizing about people." The Homeowner reiterated:

> The point I'm trying to make here is that it is a different type of housing in this neighborhood that would be next to that type of facility. It is not $125,000 homes, it is not whatever they are for trailer homes. These are houses that are valued between 300,000 and $400,000.

Later in the hearing, another board member referred to premeeting discussions, stating, "[I]t was socioeconomic impact discussion that really sort of floored me because it dealt with the income levels of people who will be using this type of storage facility." He also alluded to the Homeowner's comments and said:

> [T]hat's offensive to me, okay? It's offenses [sic] to have that type of discussion about the construction of a storage facility.
>
> I'm convinced that if we took the same structure that [Leise] wants to build and put something else on the inside of it, we wouldn't get this argument because it wouldn't be a storage facility . . . .

Immediately following the hearing, the Planning Board voted in favor of the conditional use permit, special use permit, and MCC overlay rezoning. Thus, the conditional use permit was approved, subject to conditions, and the special use permit and rezoning were forwarded to the City Council for final action.

On September 29, 2015, the City Council held a public hearing on the special use permit and rezoning, designated as separate agenda items. Prior to the hearing before the City Council, nearby residents submitted to the City Council an "Opposition Document" detailing their concerns about the proposed project. Two hundred ninety-two neighboring residents, including at least three of the Homeowners, signed "petitions" that accompanied the opposition document. The opposition document was later filed in the City clerk's office. At the hearing, the Developers' attorney again spoke. In addition, some neighbors voiced concerns similar to those discussed at previous hearings. The City Council voted to lay over the case for 3 weeks.

On October 20, 2015, the City Council held another hearing. The Developers' attorney stated that in response to the neighbors' concerns, the Developers had further revised the plan, adding seven features which the Developers listed in a letter to the City Council. The seven features pertained to enhanced landscaping and finishes to improve the appearance of the proposed development. At the hearing, the Developers' attorney reported that one of the homeowners' associations that had formerly objected to the project had now approved it.

The Homeowners' representative stated at the hearing that they had presented an "alternative design" to the Developers. The Developers' attorney responded that they had evaluated the cost of the alternative design relative to the potential income and concluded that it would be an "economic disaster."

The City Council voted 5 to 2 to approve the MCC rezoning and ultimately passed an ordinance to implement it. The City Council also approved the special use permit by a vote of 5 to 2, subject to compliance with various regulations and conditions, including the seven features listed in the Developers' October 19, 2015, letter.

### 3. District Court Proceedings

On October 21, 2015, the Homeowners filed a petition in error with the district court, seeking to challenge the approvals of the conditional use permit, special use permit, and rezoning.

On October 30, 2015, the Homeowners filed an application for a temporary restraining order and temporary injunction in district court. They sought to prevent the issuance of any permits, the implementation of the MCC overlay district, and the development of the subject property.

On November 2, 2015, the Homeowners filed an amended petition in error. The Homeowners requested vacation or reversal of (1) the Planning Board's approval of the conditional use permit, (2) the City Council's passage of a resolution that approved the special use permit, and (3) the City Council's passage of an ordinance implementing the MCC overlay district. The Homeowners claimed that the decisions of the City Council and the Planning Board were illegal, not supported by the evidence, and thus arbitrary, unreasonable, clearly wrong, and a violation of due process. Specifically regarding the special use permit and the MCC overlay district, the Homeowners alleged, among other things, that Leise had failed to provide accurate information about the ownership of the subject property or his authority to develop it.

On November 9, 2015, the Developers filed a motion to dismiss the Homeowners' amended petition in error. However, on November 25, they withdrew the motion to dismiss and filed a motion to affirm the special use permit, along with the MCC overlay district. The Developers alleged that while the Homeowners' amended petition in error was pending, the special use permit had been issued and the ordinance approving the MCC overlay district had been passed and signed by the mayor. The Developers further averred that the City entities' actions appeared to comply with the law and that the Homeowners' claims were not specific enough to meet their burden of proving otherwise.

On December 1, 2015, the City Council, the Planning Board, and the City filed an answer essentially denying the allegations of the amended petition in error. They affirmatively alleged that the Homeowners lacked standing, that the district court lacked subject matter jurisdiction over some or all of the claims, that the Homeowners made an untimely challenge of the conditional use permit, and that the City's rezoning of the subject property was not reviewable by an error proceeding.

On February 17, 2016, the district court held a hearing on the amended petition in error and received the administrative record, including chapter 55 of the Omaha Municipal Code. On that date, the district court also determined that it did not have subject matter jurisdiction over the application for a temporary restraining order and temporary injunction.

In an April 11, 2016, order, the district court affirmed the determinations of the City Council and the Planning Board and dismissed the amended petition in error with prejudice. The district court stated that after reviewing the evidence, it found that the Planning Board and the City Council acted within their jurisdiction and that their determinations were supported by sufficient relevant evidence. This appeal followed.

## III. ASSIGNMENTS OF ERROR

On direct appeal, the Homeowners assign that the district court erred in (l) finding that the Planning Board acted within its jurisdiction and had sufficient evidence to approve the conditional use permit, (2) finding that the City Council had jurisdiction and sufficient evidence to approve the special use permit, (3) finding that the City Council acted within its jurisdiction and had sufficient evidence to approve the MCC rezoning, and (4) affirming the determinations of the Planning Board and City Council, because the record showed that the Planning Board and City Council did not act with due process of law.

On cross-appeal, the City, the Planning Board, and the City Council assign that the district court erred in (1) failing to rule that the Homeowners' petition in error was untimely as to the conditional use permit, (2) failing to rule that the Homeowners lacked standing as to the rezoning challenge and that the district court thereby lacked subject matter jurisdiction, and (3) failing to rule that the petition in error was an improper remedy as to the rezoning, thereby precluding subject matter jurisdiction.

## IV. STANDARD OF REVIEW

[1] Interpretation of a municipal ordinance is a question of law, on which we reach an independent conclusion irrespective of the determination made by the court below. See *State ex rel. Parks v. Council of City of Omaha*, 277 Neb. 919, 766 N.W.2d 134 (2009).

[2] In reviewing a decision based on a petition in error, an appellate court determines whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence. *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997).

## V. ANALYSIS

### 1. Cross-Appeal

We begin by addressing the cross-appeal of the City, the Planning Board, and the City Council, because its resolution is partially dipositive of the Homeowners' direct appeal.

#### (a) Timeliness of Petition in Error

On cross-appeal, the City, the Planning Board, and the City Council contend that the district court lacked subject matter jurisdiction because the Homeowners untimely filed their petition in error more than 30 days after the Planning Board's decision to approve the conditional use permit.

Neb. Rev. Stat. §§ 25-1905 and 25-1931 (Reissue 2016) govern proceedings in error and require that within 30 days after the rendition of the final judgment or order sought to be reversed, vacated, or modified, a petitioner in error must file a petition and an appropriate transcript containing the final judgment or order. See, *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994); *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986). Here, the Homeowners filed their petition in error with the district court on October 21, 2015, unquestionably more than 30 days after the Planning Board approved the conditional use permit on August 5. However, the Homeowners contend that the Planning Board's approval was not a final order. We agree.

The Homeowners point to the Omaha Municipal Code, which provides that "[a]pproval of a conditional use permit by the planning board shall be effective five days after action, unless associated with an application for rezoning or subdivision approval." § 55-883(j). In this instance, the request for the conditional use permit was associated with an application for rezoning. Therefore, we apply § 55-883(c) of the Omaha Municipal Code, which addresses concurrent applications. Section 55-883(c) provides in part, "The official effective date of a conditional use permit shall be the effective date

of an ordinance approved by the city council implementing rezoning of the site." In this case, the conditional use permit went into effect on October 20, 2015, when the City Council passed the ordinance approving the amendment of the MCC overlay district. On the same date, the conditional use permit became a final order, and the Homeowners filed their petition in error on October 21, within 30 days of the final order. See Neb. Rev. Stat. § 25-1902 (Reissue 2016) (defining final order for purposes of review on petition in error). Therefore, the district court had subject matter jurisdiction. See Neb. Rev. Stat. § 25-1901 (Reissue 2016) (providing for district court's appellate jurisdiction over any "final order made by any tribunal, board, or officer exercising judicial functions") and § 25-1931.

(b) Standing

Next, the City, the Planning Board, and the City Council contend that the Homeowners failed to allege or prove any special injury arising from the "imposition of the stricter MCC overlay rules onto the subject property" and that therefore, they do not have standing. Brief for appellees on cross-appeal at 39. The City, the Planning Board, and the City Council point out that the MCC overlay district actually is more restrictive to future development than the existing commercial base district and provides the Homeowners with added protection.

[3-5] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *Id.* It is generally held that an adjacent landowner has standing to object to the rezoning of property if such landowner shows some special injury separate from a general injury to the public. See *id.*

The Homeowners point out that since they live adjacent to or within 300 feet of the proposed project, they have standing, like the property owners in *Smith v. City of Papillion, supra*. There, we noted that Neb. Rev. Stat. § 19-905 (Reissue 1997) required notice to owners of property within 300 feet of the proposed project in first-class cities such as Papillion and that the property owners' entitlement to such notice supported a finding of special injury. Here, the operative statute in metropolitan-class cities like Omaha is Neb. Rev. Stat. § 14-420 (Cum. Supp. 2016), which also requires notice to owners of property within 300 feet of the proposed project. See Neb. Rev. Stat. § 14-101 (Reissue 2012) (defining metropolitan-class cities). Thus, the Homeowners' entitlement to notice in this case tends to show the presence of a special injury. Further, in *Smith*, we noted that the finding of special injury was also supported by expert testimony that the proposed project would diminish property values in the area. We find similar evidence of a special injury in the instant case, where a real estate broker with 14 years of experience provided evidence to the Planning Board that the proposed changes would cause an adverse impact on the neighboring residents' property values. Although contradictory evidence was presented by way of the planning department report, the Homeowners met their initial burden to show standing to challenge the proposed uses and rezoning.

(c) Jurisdiction

[6,7] Lastly, the City, the Planning Board, and the City Council contend that the City Council's decision on the application for rezoning was a legislative function and, therefore, not the proper subject of an error proceeding. Previously, we have found that "an appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative power has been delegated" and that "the only remedy in such cases is by collateral attack, that is, by injunction or other suitable action." *In re Application of Frank*, 183 Neb.

722, 723, 164 N.W.2d 215, 216 (1969). We have held that a zoning ordinance constitutes the exercise of a governmental and legislative function and that a city council adopting a rezoning ordinance which amends a general zoning ordinance acts in a legislative capacity. *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989); *Copple v. City of Lincoln*, 210 Neb. 504, 315 N.W.2d 628 (1982); *In re Application of Frank, supra.*

But as pointed out by the Homeowners, although the above-cited cases preclude a petition in error following a legislative act, none of them deals with a simultaneous rezoning and special use permit. See, *Giger v. City of Omaha, supra*; *Copple v. City of Lincoln, supra*; *In re Application of Frank, supra*. Our case law does not address that situation. And the question becomes whether the City Council acted legislatively or judicially when faced with simultaneous requests for rezoning and a special use permit.

The Homeowners contend that by conducting simultaneous hearings on the special use permit and the rezoning, the City Council acted judicially. They argue:

> In deciding to include Leise's convenience storage and warehouse project within the MCC Overlay District, the . . . City Council acted judicially and not legislatively. The hearings on the amendment and the special use permit were at the same time and date, had the same participants and opponents and evidence, and utilized the same hearing procedures.

Reply brief for appellants at 10.

To support their argument, the Homeowners cite *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007), for the proposition that when a tribunal is required to conduct a hearing and receive evidence, it exercises a judicial function in determining questions of fact. And under Neb. Rev. Stat. § 25-1903 (Reissue 2016), proceedings to obtain a reversal, vacation, or modification of a final order made by any tribunal, board, or officer exercising judicial functions shall be

by a petition entitled "petition in error." However, *McNally* involved an administrative hearing before a building review board and not a hearing before a city council. Further, we noted in *McNally* that there was an adversarial hearing where evidence had been presented by both sides and that the building review board exercised "'judicial functions.'" 273 Neb. at 564, 731 N.W.2d at 580.

Where our case law has not explicitly stated whether a proceeding is quasi-judicial or legislative, the nature of the proceeding in question is a key factor in making that determination. For example, in *In re Application of Olmer*, 275 Neb. 852, 752 N.W.2d 124 (2008), we found that the county board acted quasi-judicially in denying an application for a conditional use permit; in so finding, we noted that the record included exhibits offered and received and a stipulated supplemental record which included a deposition with attached exhibits.

Here, the record reflects that the special use permit and rezoning applications proceeded at the same hearing pursuant to separate agenda items. Further, the record does not show that evidence was offered and received or that testimony was offered. Rather, the Homeowners' opposition document was simply submitted to the City Council prior to the hearing and later filed with the City clerk's office. Several neighboring residents, including some of the Homeowners, also presented argument at the two City Council hearings. Although we recognize that various boards and councils do not function as courts in the strict sense, parties cannot transform an otherwise legislative proceeding into a quasi-judicial function or establish a quasi-judicial record by simply presenting arguments and handing documents to the presiding body. In light of the nature of the proceedings at issue here, we conclude that the City Council acted as a legislative body in granting the rezoning request and in granting the special use permit. Accordingly, a request for a permanent injunction, not a petition in error, was the proper means to seek review of both determinations.

[8] Because the Homeowners filed a petition in error to review both the rezoning and special use permit approvals by the City Council, the district court did not have jurisdiction to proceed on those issues, and as a result, neither does this court. When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, the Supreme Court also lacks power to adjudicate the merits of the claim. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). We therefore dismiss for lack of jurisdiction that portion of the Homeowners' appeal regarding the City Council's approval of the rezoning and the special use permit. Consequently, we need not address the Homeowners' assignments of error concerning the rezoning and the special use permit. *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

### 2. Direct Appeal

Our holding regarding the cross-appeal limits our consideration of the Homeowners' direct appeal to only the following issues related to the conditional use permit: whether the Planning Board acted within its jurisdiction, whether it had sufficient evidence to approve the conditional use permit, and whether it acted with due process of law.

#### (a) Jurisdiction

[9] The Homeowners claim that the district court erred in finding that the Planning Board acted within its jurisdiction. In reviewing a decision based upon a petition in error, an appellate court determines, among other things, whether the inferior tribunal acted within its jurisdiction. See *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997). A party invoking the tribunal's jurisdiction has the burden to establish the elements of standing. *Field Club v. Zoning Bd. of Appeals of Omaha*, 283 Neb. 847, 814 N.W.2d 102 (2012). The

Homeowners argue that Leise failed to show standing because the application he submitted did not reflect that he was the owner of the subject property or the agent of the owner and did not specifically request a conditional use permit.

[10] Both sides agree that Leise failed to check the box requesting a conditional use permit on the original application. On the other hand, the City, the Planning Board, and the City Council point out that the Homeowners allege Leise's seeking of a conditional use permit in their amended petition in error and that the hearings were all advertised to reflect that a conditional use permit was being considered. However, the controlling issue here is that the Homeowners failed to challenge, in their petition in error, Leise's failure to check the box requesting a conditional use permit on the original application. An issue not presented to the trial court may not be raised on appeal. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). Now, for the first time, the Homeowners raise the issue of Leise's failure to check the box requesting a conditional use permit, and we cannot consider that portion of their argument.

Similarly, the Homeowners now assert that Leise lacked standing to obtain the conditional use permit because his application did not demonstrate that he was the owner of the subject property or the agent of the actual owner. They argue that Leise failed to establish any agency relationship when he incorrectly designated "Ray Anderson c/o Anderson Food Shops" as the owner, rather than "Ray Anderson, Inc." However, the Homeowners did not raise this issue before the district court in the context of the conditional use permit. Instead, their amended petition in error alleged that because Leise's application failed to provide accurate information about the ownership of the subject property or the authority to develop it, the Planning Board and the City Council lacked sufficient evidence to approve *the special use permit and the rezoning*. As it pertains to the conditional use permit, then, this issue was neither presented to nor passed upon by the

district court, and the Homeowners cannot now raise it on appeal. See *id.*

(b) Sufficiency of Evidence

[11] The Homeowners also argued to the district court and now on appeal that the Planning Board had insufficient evidence to approve the conditional use permit. In reviewing a decision based on a petition in error, an appellate court determines whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence. *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997). Further, the reviewing court is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact, and the evidence is sufficient to support an administrative agency's decision if the agency could reasonably find the facts as it did based on the testimony and exhibits contained in the record. *Geringer v. City of Omaha*, 237 Neb. 928, 468 N.W.2d 372 (1991).

In summary, the Homeowners argue that "[t]here was not sufficient competent evidence for approval of the conditional use permit for the industrial use of warehousing and distribution (limited) given the unrebutted evidence regarding lack of compatibility, adverse economic effects, and safety concerns." Brief for appellants at 30. Specifically, the Homeowners maintain that the City, the Planning Board, and the City Council failed to follow the criteria as set forth in § 55-885. Section 55-885(a) does set forth the criteria for review and evaluation for a conditional use permit. But § 55-885(b) further provides that "conditional use permits . . . shall be reviewed in accordance with the relevant criteria," which means that the reviewing body need not consider each listed standard. The record reflects that although the City, the Planning Board, and the City Council did not consider each factor within § 55-885, they gave due consideration to the factors relevant in this case.

Additionally, the Homeowners argue that the affected residential areas are composed of single-family dwellings in medium- to low-density neighborhoods and are not zoned to include convenience storage or warehousing as conditional or special uses. The Homeowners contend that the Planning Board approved the conditional use permit for limited industrial warehousing and distribution "without any consideration of extensive public opposition to the project and the unrebutted concerns regarding compatibility, adverse economic effects, and safety concerns." Brief for appellants at 29. Certainly, opposition and concerns were raised.

On the other hand, the City's planning department presented a report to the Planning Board dated April 29, 2015, which analyzed Leise's application. That report acknowledged the surrounding residential properties and that prior to the subject property's annexation by the City, warehousing and distribution were permitted uses for the subject property. It noted that Leise's permit request was in substantial conformance with the zoning ordinance and the City's master plan. Further, the planning department's report thoroughly analyzed the proposed project in light of the relevant criteria of § 55-885 and concluded that the economic impact on surrounding properties was acceptable. In an updated report dated July 29, 2015, the planning department opined that Leise had essentially complied with all requested changes to his proposal and recommended approval of the conditional use permit, the special use permit, and the rezoning, subject to certain conditions.

Although the Homeowners raised valid concerns, we cannot find from the record that the Planning Board did not evaluate the application using its own criteria as outlined in § 55-885 or that its decision was not supported by sufficient relevant evidence.

### (c) Due Process

Lastly, the Homeowners contend that they were not provided due process. They argue:

> The [Planning] Board did not provide the opportunity to question . . . Leise or his counsel. Very little time was provided to present opposition evidence and concerns to the [Planning] Board. It was clear from the responses by the majority of [Planning] Board members to concerned citizens' testimony at the May 6 . . . and August 5, 2015 public meetings that the [Planning] Board had already decided in favor of . . . Leise's plan.

Brief for appellants at 33. The Homeowners obviously believe that the Planning Board did not sufficiently consider their viewpoint.

However, the two portions of the record that the Homeowners cite do not support their position. First, a Homeowner suggested that the storage facility would be frequented by owners of lower-end homes rather than owners of higher-end homes such as his. In response, a board member cautioned him and others present to be "very careful about generalizing about people." The Homeowners argue that this reflects that the Planning Board was not an "impartial adjudicator . . . and in effect became witnesses" for Leise. Brief for appellants at 32. Certainly, the Homeowner who offered the suggestion had the right to protect his property investment, which he believed would be adversely affected by the proposed uses. However, a Planning Board member's redirecting the Homeowner's comments does not equate with partiality or becoming a witness. Second, the Homeowners point to a portion of the record wherein a Planning Board member expressed his concerns about the Homeowners' arguing against the project from a socioeconomic standpoint. Again, we cannot find that those concerns reflected either that the board member was not impartial or that he had become a witness. Further, neither instance shows that the Homeowners were not allowed to offer evidence, were not allowed to offer their opinion, or attempted to question Leise on the record.

[12] A court reviewing an order of an administrative agency must determine whether there has been due process of law;

and this includes an inquiry into the jurisdiction of the agency, whether there was reasonable notice and an opportunity for fair hearing, and whether the finding was supported by evidence. *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992). See, also, *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997) (in proceedings before administrative agency or tribunal, procedural due process requires, among other things, opportunity to present evidence and hearing before impartial board). As an appellate court performing a review of the record for due process, we are positioned not to judge the wisdom of the Planning Board's decision, but to ensure that an aggrieved party had the opportunity to be heard. The Homeowners had that opportunity. Certainly, another board may have allowed more time than allotted here, but the amount of time devoted is not as relevant as the independence of the inquiry. In particular, for us to find error, the record must reflect an actual bias rather than mere disagreement. Based on our review of the record, we find that the Homeowners were provided due process.

## VI. CONCLUSION

For the aforementioned reasons, we dismiss for lack of jurisdiction the portion of the Homeowners' appeal addressing the rezoning and special use permit, and we further vacate the district court's order in that regard for lack of jurisdiction. However, we affirm the district court's order in regard to the conditional use permit.

Affirmed in part, and in part
vacated and dismissed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Robert L. Stephens, appellee, v. Janet E. Stephens, appellant.

899 N.W.2d 582

Filed July 14, 2017. No. S-16-431.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Appeal and Error.** Errors must be specifically assigned and argued to be considered by an appellate court.
4. **Statutes: Words and Phrases.** Traditionally, the word "include" in a statute connotes that the provided list of components is not exhaustive and that there are other items includable though not specifically enumerated.
5. **Property Division.** Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2016) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and determine the marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
6. **Divorce: Property Division.** All property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to this general rule.
7. ____: ____. Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property.
8. **Divorce: Property Division: Pensions.** Investment earnings accrued during the marriage on the nonmarital portion of a retirement account

may be classified as nonmarital where the party seeking the classification proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is due solely to inflation, market forces, or guaranteed rate rather than the direct or indirect effort, contribution, or fund management of either spouse.

9. **Divorce: Property Division.** The active appreciation rule sets forth the relevant test to determine to what extent marital efforts caused any part of the appreciation or income.
10. **Property Division: Words and Phrases.** Appreciation caused by marital contributions is known as active appreciation, and it constitutes marital property.
11. ____: ____. Passive appreciation is appreciation caused by separate contributions and nonmarital forces.
12. **Divorce: Property Division: Proof.** The burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation or income.
13. **Divorce: Property Division.** Appreciation or income of a nonmarital asset during the marriage is marital insofar as it was caused by the efforts of either spouse or both spouses.
14. **Corporations: Employer and Employee.** Despite the importance of each employee in a company, a company's value for purposes of active appreciation is attributable only to the efforts of first-tier management or similar persons with control over the asset's value.
15. ____: ____. Courts have uniformly rejected arguments by the owning spouse that the universe of persons in a company that effect its value is so large that no one person has any significant effect.
16. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
17. **Divorce: Mental Competency.** The amount of support awarded under Neb. Rev. Stat. § 42-362 (Reissue 2016) is a matter initially entrusted to the sound discretion of the trial judge, which award, on appeal to this court, is reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed in part, vacated in part, and in part reversed and remanded with directions.

Stefanie Flodman and Steven J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellant.

David P. Kyker for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Wright, J.

## I. NATURE OF CASE

In this dissolution action, the husband is the cofounder and president of a C corporation and owns 34 percent of its stock. He asserts that only the appreciation, during the marriage, of a business interest that is due to the active efforts of the nonowning spouse is part of the marital estate. He claims, therefore, that none of the almost $5 million in appreciation of his stock interest during the parties' 25-year marriage was subject to equitable division.

## II. BACKGROUND

Janet E. Stephens and Robert L. Stephens were married on September 8, 1991. Twin boys were born of the marriage in 1996. Robert filed for dissolution in 2014.

For approximately 15 years of the marriage, Janet worked as a real estate agent. But during the last 10 years of the marriage, Janet suffered from a mental illness that required periodic hospitalization and left her unable to work. She receives approximately $1,500 per month in Social Security disability income. Robert testified that he did not expect Janet would recover and become employable in the future.

A guardian ad litem (GAL) was appointed to protect Janet's interests at trial. The GAL is also Janet's guardian and conservator. Janet refused to participate in the dissolution proceedings but was represented by counsel.

Both before and during the marriage, Robert worked full time as president of Stephens & Smith Construction Co., Inc. (Stephens & Smith), and his current annual salary is approximately $265,000 per year. Robert received additional income from bonuses and from his other business interests. In 2014, Robert's total taxable income was $503,414. When Janet's mental health allowed, she shared equally with Robert the tasks relating to the care of their children.

The principal issue at trial was what assets should be considered marital and subject to equitable division. The approximate total value of the assets under the court's consideration in the dissolution action was $9 million. There were 166 exhibits entered into evidence without objection, and Robert was the only witness.

### 1. Stephens & Smith

Stephens & Smith is a construction company specializing in concrete work. At all relevant times before and during the marriage, Robert owned stock totaling 34 percent of the stock of Stephens & Smith. Robert cofounded Stephens & Smith in 1971 as a partnership with Michael Smith. Stephens & Smith was incorporated as a C corporation in 1974. According to the exhibits in the record, Robert's stock in Stephens & Smith was worth $298,459 in 1991 before the parties married. Robert's stock in Stephens & Smith at the time of dissolution was worth $5,044,934.16.

Robert worked a "normal eight-hour day," 5 days a week, in his capacity as president. At other times during the marriage, he worked more. He was also on the 12-member board of directors. Robert admitted that he sets his own salary and has a significant role in determining bonuses.

Robert testified that the leadership personnel of Stephens & Smith has not changed since the marriage. He described Stephens & Smith as consisting of six moneymaking departments, each with its own department head. Robert was involved in selecting and training the leadership within Stephens & Smith. At all times during the marriage, Stephens & Smith had approximately 200 employees. Robert considered at least 20 of those employees "integral," though he believed every employee was important.

Robert described his role as president as "constantly changing." He made financial and investment decisions for Stephens & Smith and performed "some management real estate oversight." As part of obtaining lending to fund Stephens &

Smith's projects, Robert also personally guaranteed millions of dollars in loans for Stephens & Smith's operations.

Robert attended human resources, rental management, shareholder, and board meetings. He occasionally consulted with and advised the department heads for the company. Robert conceded that he was an integral part of the success of Stephens & Smith. But Robert suggested that, based on his latest bonus of 6 percent, "maybe I provide 6 percent of the leadership."

#### 2. R.I.P., Inc.

R.I.P., Inc., is a wholly owned subsidiary of Stephens & Smith. It holds Stephens & Smith's real estate investments and represents approximately two-thirds of Stephens & Smith's value. R.I.P. was created before the marriage with capital from Stephens & Smith, and continued thereafter to be funded by the profits of Stephens & Smith. R.I.P. owns a percentage of The Mystic Pines Apartments, L.L.C.; Eagles Landing Apartments, LLC; Aardvark Antique Mall, LLC; and Village Square Apartments, LLC. Although there was no testimony specifically on this point, Robert's estimated interest in Stephens & Smith of $5,044,934.16 apparently includes any interests held through R.I.P.

#### 3. Infinity S Development Co., Heritage Square Partners, Smith and Stephens Real Estate, and Aardvark Partners

##### (a) Infinity S Development

Infinity S Development Co. (Infinity) is a partnership between Robert, Smith, and one other partner. Infinity is predominantly involved in the self-storage business, and at the time of trial, it owned approximately 900 storage units. At one point, Robert testified that no capital has been added to Infinity since the marriage. Its expansion has been paid for with the partnership's profits. Robert also indicated, however, that as with Stephens & Smith, he had personally guaranteed bank loans to Infinity.

The day-to-day operation of Infinity is run by a hired manager. But Robert and the two other partners make the larger decisions, such as what to build. Robert participates in monthly meetings to analyze occupancy rates and financial statements. Robert owns one-fourth of Infinity. According to the exhibits in evidence, at the time of trial, Robert's equity interest in Infinity was $1,243,232. In contrast, when the parties married, Robert's interest in Infinity was worth $270,553.

(b) Heritage Square Partners

Heritage Square Partners (Heritage) was formed as an offshoot of Infinity just prior to the marriage. The partnership consists of Robert; Smith; and, originally, three other persons. It owns one building that was capitalized with funds from Infinity and with loans. No other funds have been funneled into Heritage since the marriage. The building provides rental income and is managed by a person employed by the partnership. Robert is not involved in the day-to-day operation of Heritage. At the time of trial, Robert's equity interest in Heritage was $403,884. It was unclear what the value of Robert's interest in Heritage was at the time the parties married.

(c) Smith and Stephens Real Estate

Smith and Stephens Real Estate was created by Robert and Smith before the marriage and owns a single piece of property that was purchased before the marriage. The value of Robert's interest in Smith and Stephens Real Estate when the parties married was $88,830, and it was $140,000 at the time of trial.

(d) Aardvark Partners

Aardvark Partners, LLC, was formed after the marriage. It was formed by the five partners of Infinity and with R.I.P. as the sixth partner. R.I.P. owns 50 percent of Aardvark Partners. The $500,000 purchase of the real estate held by Aardvark Partners was capitalized with $50,000 from each of five individual

investor partners from Infinity and $250,000 from R.I.P. Each individual obtained the $50,000 contribution through a distribution of $55,000 from Infinity.

Aardvark Partners owns a property that consists of a cluster of buildings and parking lots. Robert is not involved in the day-to-day operation of Aardvark Partners, which is run by a hired manager. At the time of trial, Robert's interest in Aardvark Partners was valued at $306,429.

### 4. Aardvark Antique Mall, The Mystic Pines Apartments, and Eagles Landing Apartments

Robert conceded at trial that his ownership interests in Aardvark Antique Mall, The Mystic Pines Apartments, and Eagles Landing Apartments were marital property. At the time of trial, Aardvark Antique Mall was valued at $66,474, The Mystic Pines Apartments were valued at $923,687, and Eagles Landing Apartments were valued at $381,385. Robert's combined interest in the three properties produced approximately $60,000 per year in owner draws, and he proposed that it would be most beneficial for all parties to transfer to Janet the ownership interest in these properties.

Janet's attorney and GAL questioned the practicality of making Janet part-owner of the properties. Janet's counsel also pointed out that transfer of ownership would require the cooperation of the other partners, since at least two of the entities required owner approval before allowing new members. Robert assured the court that the partners having an interest in these properties would cooperate.

### 5. Decree

The court awarded to Robert the marital home, valued at $542,000, and the mortgage debt therein, in the amount of $337,078. Also awarded to Robert, subject to liens or encumbrances, were a "60-foot Gen[i]e Manlift" valued at $20,000, a jet ski valued at $1,740, a 1998 motorcycle valued at $7,625, a 2003 automobile valued at $16,904, and a 2005 recreation

vehicle valued at $60,250. The only debt associated with these items appears to be an automobile loan in the amount of $19,893.

Robert was awarded $31,965 in household goods and artwork. Robert was awarded a credit union checking account with a balance of $553.50 and a bank checking account with a balance of $100. Robert was awarded Stephens & Smith retirement plans valued at $326,104.79. The retirement plans were formed after the marriage, and Robert had conceded they were marital assets.

Robert was solely responsible for a personal loan in 2009 from his sister in the amount of $480,589, for the purpose of investing in Eagles Landing Apartments and The Mystic Pines Apartments. Robert was awarded any and all bank or investment accounts, life insurance policies and annuities, and any household goods or personal property in his possession not otherwise allocated.

The court awarded to Janet, along with any indebtedness thereon, a 2012 automobile valued at $27,357. The court awarded to Janet $18,510 in household goods and artwork, any and all jewelry, including a $10,000 ring that Janet had purportedly flushed down the toilet. It was unclear to what extent the other jewelry could be located at the time of trial. The jewelry, minus the ring, was appraised at $72,760. Janet was awarded an account at a local bank with a balance at the time of trial of $10,010. She was awarded any and all bank or investment accounts, life insurance policies and annuities, and any household goods or personal property in her possession not otherwise allocated.

The court found that Robert's combined interest in Aardvark Antique Mall ($66,474), The Mystic Pines Apartments ($923,687), and Eagles Landing Apartments ($381,385) was part of the marital estate. In light of the tax disadvantages of the forced buying or selling of the business interests, and the court's trust that Robert would conduct his business affairs so as not to disadvantage Janet, the court awarded Robert and

Janet each one-half of the total interest in these properties through a transfer of ownership. Robert was ordered to complete all documentation of such joint ownership within 30 days of the decree.

The court found that Robert's ownership interests in Infinity, Heritage, Smith and Stephens Real Estate, and Aardvark Partners were traceable to premarital assets and that the entirety of the appreciation in value of these interests during the marriage was excludable from the marital estate, because Robert had a "passive" role in such appreciation. It noted that no marital assets and no active effort by Janet contributed to these entities. The court awarded these interests in their entirety to Robert.

The court also found that Robert's 34 percent ownership interest in Stephens & Smith was, in its entirety, nonmarital. It did not specifically mention R.I.P. in its decree, which was presumably treated as part of Stephens & Smith.

The court noted that no marital funds were contributed to Stephens & Smith. And, as for the substantial appreciation of the company's value during the marriage, the court cited *Van Newkirk v. Van Newkirk*[1] and *Buche v. Buche*.[2] Ultimately, the court concluded that Robert had met his burden of proof that his stock, including the appreciation during the marriage, was premarital property. In this regard, the court reasoned that the appreciation was "due to a combination of factors, not the least of which is organic growth" and that "[t]here is no evidence to suggest what part of that growth can be attributed to [Robert]."

Although the court concluded that the entirety of Stephens & Smith was nonmarital property, it nevertheless awarded a "*Grace* award"[3] to Janet based on the court's valuation of Robert's stock interest in Stephens & Smith. The court found

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[1] *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982).

[2] *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988).

[3] See *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986).

that other considerations and equities present in the case justified an award to Janet of $1.1 million to be paid in installments of $100,000 per year, with interest of 2.51 percent on the outstanding balance. The court explained as to the mathematical basis for such award that if the appreciation of Robert's ownership interest in Stephens & Smith were marital, one-third of that interest would be $1.55 million and one-half would be $2.35 million.

Other marital property, a coin collection and various items held in storage units, had not yet been given an estimated value and were ordered divided by equal value or sold with the proceeds to be divided equally between Robert and Janet.

The court found that Janet was suffering from a mental illness as defined by Neb. Rev. Stat. § 42-362 (Reissue 2016) and awarded alimony under § 42-362 in the amount of $1,000 per month for 120 months. It ordered Robert to maintain until August 20, 2020, a life insurance policy in the amount of $1 million, with Janet as the beneficiary.

Janet appeals from the decree. Robert did not cross-appeal.

## III. ASSIGNMENTS OF ERROR

Janet assigns that the district court erred in (1) finding that the appreciation in the value of Stephens & Smith during the parties' marriage should be considered nonmarital, (2) failing to find that the spousal support ordered under § 42-362 should continue until Janet's mental disability is corrected, and (3) ordering the division of marital property held in a small business or partnership when the articles of organization do not allow for the same.

## IV. STANDARD OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.[4] A judicial abuse of discretion exists if the reasons or

[4] *Stanosheck v. Jeanette*, 294 Neb. 138, 881 N.W.2d 599 (2016).

rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[5]

## V. ANALYSIS

### 1. Property Division

[3] Janet first assigns as error the district court's finding that the appreciation during the parties' marriage of Robert's interest in Stephens & Smith should be considered nonmarital. She does not assign as error the court's determination that other assets at issue at trial were nonmarital. Errors must be specifically assigned and argued to be considered by an appellate court.[6]

Thus, we consider only whether the district court erred in its classification of Stephens & Smith, together with its wholly owned subsidiary, R.I.P.—which we hereafter refer to collectively as "Stephens & Smith." We do not consider whether the court erred with respect to its classification of Infinity, Heritage, Smith and Stephens Real Estate, or Aardvark Partners as nonmarital assets. And because Robert did not cross-appeal, neither do we consider whether the court erred in designating Aardvark Antique Mall, The Mystic Pines Apartments, and Eagles Landing Apartments as marital. We do consider the propriety of the "*Grace* award," as it is inseparable from the court's determination that Stephens & Smith was nonmarital.

Neb. Rev. Stat. § 42-365 (Reissue 2016) provides that when a dissolution of marriage is decreed, the court may order the

> division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers

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[5] *Id.*

[6] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

> or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Section 42-365 provides that "[t]he purpose of a property division is to distribute the *marital assets* equitably between the parties." (Emphasis supplied.)

No statute defines "marital assets." Neb. Rev. Stat. § 42-366(8) (Reissue 2016) states that in the event the parties fail to agree upon a property settlement that is conscionable, the court shall order the equitable division of the marital estate, which "shall include . . . any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested." But no statutory provision relating to the equitable division of property specifically addresses business entities or the concept of appreciation.

[4] We find no merit to Robert's argument that § 42-366 is a legislative mandate to exclude from the marital estate items not specifically listed in § 42-366. Traditionally, the word "include" in a statute connotes that the provided list of components is not exhaustive and that there are other items includable though not specifically enumerated.[7] And § 42-366 seems particularly concerned with clarifying the status of nonvested assets. Business interests like Stephens & Smith, and indeed many other assets such as the marital home, do not fall into that category. Thus, it is no surprise that they are not enumerated. Moreover, while the Legislature specified the condition in § 42-366(8) "owned by either party" as

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[7] See *Samantar v. Yousuf*, 560 U.S. 305, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010). See, also, *Stansell v. Revolutionary Armed Forces of Colombia*, 704 F.3d 910 (11th Cir. 2013); *Federal Election Com'n v. Mass. Citizens for Life*, 769 F.2d 13 (1st Cir. 1985); *Highway & City Freight Drivers, Etc. v. Gordon*, 576 F.2d 1285 (8th Cir. 1978); *Matter of Adoption by W.P. and M.P.*, 308 N.J. Super. 376, 706 A.2d 198 (1998); *Auer v. Com.*, 46 Va. App. 637, 621 S.E.2d 140 (2005).

to the assets listed, we have held as to these listed assets that only the portion of such deferred compensation benefits that was earned or contributed to during the marriage is part of the marital estate.[8] In sum, § 42-366 does not indicate whether appreciation during the marriage of a nonmarital business or property interest is a marital asset. That question has instead long been determined by case law.

[5] Since 2000, we classify as a threshold matter the parties' property as either marital or nonmarital. In *Meints v. Meints*,[9] we said:

> Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and determine the marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

Such division between the marital and nonmarital estate is known as dual classification. Prior to *Meints*, our case law was not entirely clear as to whether we operated under a dual classification system. Most jurisdictions adopt the dual classification model and preclude under this model the equitable distribution of separate property.[10] "Equitable considerations are generally no excuse for failing to follow the statutory classification process."[11]

[6,7] We have said that all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to this

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[8] See, e.g., *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015).

[9] *Meints v. Meints*, 258 Neb. 1017, 1023, 608 N.W.2d 564, 569 (2000). See, also, 3 Brett R. Turner, Equitable Distribution of Property, appendix A at 274 (3d ed. 2005).

[10] See 1 Brett R. Turner, Equitable Distribution of Property § 2:10 (3d ed. 2005).

[11] See *id.*, § 5:7 at 266.

general rule.[12] Thus, for example, income from either party that accumulates during the marriage is a marital asset.[13] Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property.[14] Therefore, the original capital or value of an asset may be nonmarital, while all or some portion of the earnings or appreciation of that asset may be marital.[15]

[8] In the recent case of *Stanosheck v. Jeanette*,[16] we said that investment earnings accrued during the marriage on the nonmarital portion of a retirement account may be classified as nonmarital where the party seeking the classification proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is due solely to inflation, market forces, or guaranteed rate rather than the direct or indirect effort, contribution, or fund management of *either* spouse. In *Coufal v. Coufal*,[17] we similarly examined whether the increase in the value of the premarital capital in a retirement account was a marital asset. After examining cases from other jurisdictions discussing the active appreciation rule, we held that the appreciation was nonmarital, because it was not caused by the direct or indirect efforts of "either spouse."[18]

[9-11] Other jurisdictions have reached a "remarkable degree of consensus" that appreciation or income of separate property is marital property to the extent that it was caused by marital funds or marital efforts.[19] The active appreciation

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[12] See *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

[13] See *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001).

[14] See 1 Turner, *supra* note 10, § 5:20.

[15] See *id.*

[16] *Stanosheck v. Jeanette, supra* note 4.

[17] *Coufal v. Coufal, supra* note 8.

[18] *Id*. at 384, 866 N.W.2d at 79.

[19] 1 Turner, *supra* note 10, § 5:54 at 546. See, also, Annot., 39 A.L.R.6th 205 (2008).

rule sets forth the relevant test to determine to what extent marital efforts caused any part of the appreciation or income.[20] "Appreciation caused by marital contributions is known as *active appreciation*, and it constitutes marital property in the first instance."[21] In contrast, passive appreciation is appreciation caused by separate contributions and nonmarital forces.[22] And most states, by statute or case law, define marital contribution broadly to include the efforts of either the owning or the nonowning spouse.[23]

Robert, however, argues that *Stanosheck* and *Coufal*, inasmuch as they recognize as marital property growth due to the efforts of the owning spouse, are limited to retirement accounts. He argues that appreciation of business interests outside of retirement accounts should be considered a marital asset only if the appreciation during the marriage was caused by the efforts of the nonowning spouse.

In support of this position, Robert relies on statements by this court in cases decided before we clearly adopted a dual classification system[24] and under facts demonstrating that the appreciation of the nonmarital asset was due principally to inflation and market forces.[25] Under these circumstances, in *Van Newkirk v. Van Newkirk*, we said that property acquired by gift or inheritance is not considered part of the marital estate unless

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[20] See 1 Turner, *supra* note 10, § 5:55.

[21] *Id*. at 549.

[22] *Id.*

[23] *Id*., § 5:56. See, also, e.g., *Hanson v. Hanson*, 125 P.3d 299 (Alaska 2005); *Horton v. Horton*, 299 Ga. 46, 785 S.E.2d 891 (2016); *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987). See, generally, 39 A.L.R.6th, *supra* note 19.

[24] See *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980) (consideration of inherited property depends on equities involved).

[25] See, *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Ross v. Ross*, 219 Neb. 528, 364 N.W.2d 508 (1985); *Van Newkirk v. Van Newkirk, supra* note 1.

> both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage.[26]

But in *Rezac v. Rezac*,[27] decided only 3 years after *Van Newkirk*, we recognized as a marital asset the appreciation of nonmarital property due solely to the contributions of the owning spouse during the marriage. We held in *Rezac* that the lower court did not err in dividing as marital property the entirety of the appreciated value of the husband's premarital stock in a corporation. We explained that if the husband's ownership of the corporation had been merely "nominal" or the increase in the value of the stock during the marriage had been "strictly an inflationary increase,"[28] there would have been a better argument that the stock should be viewed as continuing to be separate property. But such was not the case.

We observed in *Rezac* that the lower court was correct in treating the appreciation of stock as marital property, because the corporation had paid for substantial improvements that increased the corporate value, in lieu of distributing profits to its owners as income. We explained that "had the corporation not made substantial investments in improving its facility, the value of the stock may have remained about the same but this respondent would have received additional income resulting in marital assets which would be subject to division at the time of the dissolution."[29]

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[26] *Van Newkirk v. Van Newkirk, supra* note 1, 212 Neb. at 733, 325 N.W.2d at 834.

[27] *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985).

[28] *Id*. at 518, 378 N.W.2d at 198.

[29] *Id*. See, also, *Sughroue v. Sughroue*, 19 Neb. App. 912, 815 N.W.2d 210 (2012).

Though we observed in *Rezac* that the appreciation was through reinvestment of income, other courts and legal authorities find no meaningful distinction between appreciation through reinvestment of income and appreciation through active efforts other than reinvestment.[30] Income from and appreciation of an asset are fundamentally similar insofar as they are both ways that the property generates value.[31] The only difference is that income takes the form of a new asset, while appreciation takes the form of added value.[32] This difference in form bears "no relation to the policies behind equitable distribution."[33]

Nevertheless, in *Grace v. Grace*,[34] a case decided a few years after *Van Newkirk* and *Rezac*, we implicitly accepted without analysis an appreciation/income distinction. There, because of the inequities created by the application of such a distinction, we were compelled to consider the value of nonmarital assets in determining the equitable amount of the property division.

In *Grace*, we applied our statement in *Van Newkirk* to hold that the husband's interest in a premarital family business was nonmarital. Then we said that whether an asset is marital is but one consideration in the equitable division of property.[35] Especially in light of the minimal accumulation of marital assets due to the provision by the business of the marital home and other expenses, we held that the wife should be awarded a lump sum representing her portion of the husband's corporate interest—even though the wife did not contribute to the improvement or operation of the business.

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[30] See 1 Turner, *supra* note 10, § 5:50 (and cases cited therein).

[31] See *id.*, § 5:50.

[32] See *id.*

[33] *Id.* at 524.

[34] *Grace v. Grace, supra* note 3.

[35] *Id.*

A series of cases from the Nebraska Court of Appeals have since recognized so-called *Grace* awards in order to achieve an equitable result when the application of our statement in *Van Newkirk* renders appreciation during the marriage nonmarital.[36] It has not been clear under this line of case law what exceptional circumstances warrant a *Grace* award. The mathematics behind the amount of such *Grace* awards have likewise never been clear. But *Grace* awards generally represent a smaller division of the asset in question than the expected division if the asset were considered marital.[37]

We find inapplicable to the modern dual classification system any statements in *Van Newkirk* and its progeny which fail to recognize as a marital asset appreciation through the active efforts of the owning spouse. For purposes of the active appreciation rule, there is no reason to treat appreciation of a nonmarital asset differently from income derived from a nonmarital asset during the marriage. We conclude, likewise, that the principles set forth in *Grace* are no longer applicable to the dual classification system set forth by this court in *Meints v. Meints*.[38] This is not to say that a court would, in every conceivable circumstance, be forbidden from taking into account nonmarital assets in its equitable division of the marital estate, but our adoption of the active appreciation rule as set forth herein limits the need for such an extraordinary recourse.

[12] We hold, therefore, that the principles set forth in *Stanosheck* apply equally to appreciation or income during the marriage of any nonmarital asset. Thus, accrued investment earnings or appreciation of nonmarital assets during

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[36] See, *Keig v. Keig*, 20 Neb. App. 362, 826 N.W.2d 879 (2012); *Shuck v. Shuck*, 18 Neb. App. 867, 806 N.W.2d 580 (2011); *Charron v. Charron*, 16 Neb. App. 724, 751 N.W.2d 645 (2008); *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001).

[37] See *id.*

[38] *Meints v. Meints, supra* note 9.

the marriage are presumed marital unless the party seeking the classification of the growth as nonmarital proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is not due to the active efforts of either spouse.[39] We agree with many other jurisdictions that the burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation or income.[40] This is the better policy, because it places the burden on the party who has the best access to the relevant evidence.[41]

[13] We expressly adopt the active appreciation rule that does not distinguish between the efforts of the owning spouse and the efforts of the nonowning spouse. We agree that the majority rule recognizing as a marital contribution the efforts of either the owning or the nonowning spouse is "clearly correct, as the marital estate should include the fruits of either spouse's efforts during the marriage."[42] We hold that the appreciation or income of a nonmarital asset during the marriage is marital insofar as it was caused by the efforts of either spouse or both spouses.

Under the district court's interpretation of our admittedly confusing line of case law, it concluded that appreciation

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[39] *Stanosheck v. Jeanette, supra* note 4.

[40] 1 Turner, *supra* note 10, § 5:56.

[41] See *id*., citing *Harrower v. Harrower*, 71 P.3d 854 (Alaska 2003); *Chapman v. Chapman*, 866 So. 2d 118 (Fla. App. 2004); *Macdonald v. Macdonald*, 532 A.2d 1046 (Me. 1987); *Berenberg v. Berenberg*, 474 N.W.2d 843 (Minn. App. 1991); *Waring v. Waring*, 747 So. 2d 252 (Miss. 1999); *Klaus v. Klaus*, 918 S.W.2d 407 (Mo. App. 1996); *Jurado v. Jurado*, 119 N.M. 522, 892 P.2d 969 (N.M. App. 1995); *Pulice v. Pulice*, 242 A.D.2d 527, 661 N.Y.S.2d 675 (1997); *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991); *Thielenhaus v. Thielenhaus*, 890 P.2d 925 (Okla. 1995); *Garfinkel v. Garfinkel*, 945 S.W.2d 744 (Tenn. App. 1996); *Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (1999); *In re Marriage of Popp v. Popp*, 146 Wis. 2d 778, 432 N.W.2d 600 (Wis. App. 1988).

[42] 1 Turner, *supra* note 10, § 5:56 at 564.

of Stephens & Smith due to Robert's active efforts was not includable in the marital estate. The court accordingly made no findings concerning what portion of Stephens & Smith's appreciation was attributable to Robert's active efforts. Because Janet did not directly contribute to Stephens & Smith, the court concluded that the entirety of Stephens & Smith's appreciation during the marriage was nonmarital. In its attempt to make an equitable distribution after having thus excluded approximately $5 million from the marital estate, the court awarded as a *Grace* award approximately one-fourth of Robert's 34-percent interest in Stephens & Smith.

Based upon the active appreciation rule, the court should not have excluded Stephens & Smith from the marital estate and substituted a *Grace* award. We reverse the court's determination of the marital property to the extent that it did not include the increase in value of Robert's interest in Stephens & Smith, and we vacate the court's *Grace* award.

The classification of the growth in value of Robert's stock, including that due to retained earnings by Stephens & Smith,[43] depends on the extent that the overall growth of the company was caused by Robert's active efforts. In this case, there was no dispute that Stephens & Smith appreciated significantly during the marriage and that Robert's active efforts played a significant role in that appreciation. Indeed, the underlying facts were not contested. Robert, cofounder and president of Stephens & Smith, worked full time in that capacity during the entirety of the 25-year marriage.

[14,15] Despite the importance of each employee in a company, a company's value for purposes of active appreciation is attributable only to the efforts of first-tier management or similar persons with control over the asset's value.[44] First-tier management is responsible for ensuring the policy, direction, and good will that contributes most directly to the value of a

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[43] See *id.*, § 5:53.

[44] See *id.*, § 5:57.

company's stock.[45] Courts have uniformly rejected arguments by the owning spouse that the universe of persons in a company that effect its value is so large that no one person has any significant effect.[46]

Even favorable market conditions are not passive inasmuch as they create merely the opportunity that the skilled, owning spouse detects and seizes.[47] Nor does an argument that the "'ground work'" for growth was laid before the marriage preclude as a marital asset substantial appreciation of a company's value during the marriage.[48] No person wears all hats in a complex business operation, but it is nevertheless possible for one person to be critical to such operation's growth and development.[49] The appreciation of a company's stock may be due not just to a first-tier manager's direct efforts, but to his or her mere presence, when the individual is identified with the business entity and tied to its good will.[50]

[16] It was Robert's burden to demonstrate that any portion of Stephens & Smith's appreciation was due to passive forces or the active efforts of third parties who would qualify as first-tier management or similar. In presenting the evidence at trial, Robert was on notice of the possibility that the court would apply the active appreciation rule. And it has been the long-standing position of this court that the burden of proof to show that property is nonmarital remains with the person making the claim.[51] In light of this burden of proof, it is clear on the record presented that Robert's active efforts were responsible

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[45] See, *Hanson v. Hanson, supra* note 23; *Berrie v. Berrie*, 252 N.J. Super. 635, 600 A.2d 512 (1991); 1 Turner, *supra* note 10, § 5:57.

[46] 1 Turner, *supra* note 10, § 5:57.

[47] See *id*.

[48] See *Innerbichler v. Innerbichler*, 132 Md. App. 207, 230, 752 A.2d 291, 304 (2000).

[49] *Id.*

[50] See *Berrie v. Berrie, supra* note 45.

[51] *Heald v. Heald, supra* note 12.

for at least 34 percent of Stephens & Smith's growth during the 25 years that Robert and Janet were married.

We accordingly direct the court to consider as marital the entirety of the increase during the marriage of Robert's 34-percent stock interest in Stephens & Smith. Because the district court is in the better position to make an equitable division, we remand the cause with directions to determine the equitable distribution of that marital asset.

### 2. Spousal Support

We turn next to Janet's allegation that the district court erred in failing to award spousal support under § 42-362 for so long as she remains mentally ill. Janet does not take issue with the monthly amount that was awarded, only its duration.

Section 42-362 states in relevant part:

> When a marriage is dissolved and the evidence indicates that either spouse is mentally ill, the court may, at the time of dissolving the marriage or at any time thereafter, make such order for the support and maintenance of such mentally ill person as it may deem necessary and proper, having due regard to the property and income of the parties, and the court may require the party ordered to provide support and maintenance to file a bond or otherwise give security for such support. Such an order for support may be entered upon the application of the guardian or guardian ad litem or of any person, county, municipality, or institution charged with the support of such mentally ill person. The order for support may, if necessary, be revised from time to time on like application.

[17] The amount of support awarded under § 42-362 is a matter initially entrusted to the sound discretion of the trial judge, which award, on appeal to this court, is reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.[52]

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[52] *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986).

Section 42-362 empowers the court to order the payment of such support and maintenance "'as it may deem necessary and proper, having due regard to the property and income of the parties'" and, to that extent, parallels the alimony contemplated by § 42-365, but provides an additional specific ground to be considered—the mental illness of a spouse.[53]

However, support and maintenance of a mentally ill spouse and alimony are not the same in all respects.[54] In *Black v. Black*,[55] we said that although allowances of alimony in the form of requiring one to pay a fixed sum for an indefinite period of time are not favored, payment of support and maintenance of a mentally ill spouse "should continue so long as, and only so long as, the mental illness continues" or the spouse remarries. We accordingly modified the dissolution court's award of spousal support under § 42-362 until death or remarriage to provide that it shall continue only so long as the mental illness continued and the spouse did not remarry.

We have never held that a court must always award support under § 42-362 for so long as the mental illness continues. Nothing in the language of the statute indicates this is required. Rather, § 42-362 contemplates that the order of support under this section "may, if necessary, be revised from time to time on like application." We find that the district court did not abuse its discretion in making the award for 120 months. Because of our determination that Stephens & Smith is a marital asset, the court in its discretion may reconsider the amount of alimony.[56]

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[53] *Id*. at 208, 388 N.W.2d at 819.

[54] *Id.*

[55] *Id*. at 209, 388 N.W.2d at 820.

[56] See, *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993); *Olson v. Olson*, 195 Neb. 8, 236 N.W.2d 618 (1975); *Corn v. Corn*, 190 Neb. 383, 208 N.W.2d 678 (1973) (although alimony and distribution of property are technically distinct and have different purposes in marriage dissolution proceedings, they are closely related and circumstances may require that they be considered together).

### 3. Articles of Incorporation

Janet last assigns as error the fact that the court ordered the transfer to her of ownership interests in Aardvark Antique Mall, The Mystic Pines Apartments, and Eagles Landing Apartments, instead of a cash award. Janet's sole objection is her concern that the other partners will not consent to her co-ownership. Robert was ordered to complete all documentation of such joint ownership within 30 days of the decree. In the event that did not occur, and it appears that a transfer of ownership will not take place in spite of Robert's best efforts, then the parties are free to seek modification of the decree.[57] The court did not abuse its discretion in not ordering a cash award.

## VI. CONCLUSION

We affirm the distribution of ownership interests in Aardvark Antique Mall, The Mystic Pines Apartments, and Eagles Landing Apartments, instead of a cash award. We reverse the division of the property described as Stephens & Smith and direct the court to include the increase in value from the date of the marriage to the dissolution as a marital asset. The *Grace* award is reversed and vacated, because the court is directed to include the increase in value of Robert's interest in Stephens & Smith as a marital asset. We affirm the award of alimony subject to the court's discretion as set forth in this opinion.

Affirmed in part, vacated in part, and in part reversed and remanded with directions.

Stacy, J., not participating.

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[57] See *Whitesides v. Whitesides*, 290 Neb. 116, 858 N.W.2d 858 (2015).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Leo W. Hike, Jr., and Joanna K. Hike, appellants, v. State of Nebraska Department of Roads, appellee.

899 N.W.2d 614

Filed July 14, 2017. No. S-16-593.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Estoppel: Appeal and Error.** An appellate court reviews a court's application of judicial estoppel to the facts of a case for abuse of discretion and reviews its underlying factual findings for clear error.
4. **Limitations of Actions.** The determination of which statute of limitations applies is a question of law.
5. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
6. **Complaints.** Whether a complaint states a cause of action is a question of law.
7. **Judgments: Appeal and Error.** Appellate courts independently review questions of law decided by a lower court.
8. **Equity: Estoppel.** Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process.

9. **Estoppel.** The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.
10. **Estoppel: Intent.** Fundamentally, the intent behind the doctrine of judicial estoppel is to prevent parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding.
11. **Constitutional Law: Eminent Domain.** The eminent domain provision of Neb. Const. art. I, § 21, prohibits the State from taking or damaging property for public use without providing just compensation therefor.
12. **Eminent Domain: Words and Phrases.** Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.
13. **Limitations of Actions: Legislature: Intent.** A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject matter.
14. **Constitutional Law: Limitations of Actions.** Neb. Const. art. I, § 21, is enforced procedurally through the eminent domain statutes, Neb. Rev. Stat. § 76-701 et seq. (Reissue 2009 & Cum. Supp. 2016), which do not provide a special statute of limitations.
15. **Limitations of Actions.** Neb. Rev. Stat. § 25-202 (Reissue 2016) is not a special statute of limitations, but only a general statute of limitations.
16. **Limitations of Actions: Legislature: Intent.** While Neb. Rev. Stat. § 25-218 (Reissue 2016) is not a special statute of limitations for any specific type of claim, when the State is a defendant to a claim, it is a specific expression of the Legislature's will regarding the timeframe to bring such a claim.
17. **Eminent Domain: Statutes.** Neb. Rev. Stat. § 25-218 (Reissue 2016) is the applicable statute of limitations for claims of inverse condemnation against the State because § 25-218 is more specific on the subject than is Neb. Rev. Stat. § 25-202 (Reissue 2016).
18. **Actions: Words and Phrases.** Bringing an action means to sue or institute legal proceedings.
19. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
20. ____. The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Affirmed.

Jason M. Bruno and Jared C. Olson, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Douglas J. Peterson, Attorney General, and Barry K. Waid for appellee.

Heavican, C.J., Wright, Miller-Lerman, Stacy, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

This is an appeal from an order of the district court for Sarpy County, Nebraska, granting summary judgment for the State of Nebraska Department of Roads on an inverse condemnation claim filed by Leo W. Hike, Jr., and Joanna K. Hike. The court ruled that the action was barred by the 2-year statute of limitations set forth in Neb. Rev. Stat. § 25-218 (Reissue 2016). We affirm.

## II. FACTS

This is the second case between the Hikes and the State. In the first case, *Hike v. State* (*Hike I*),[1] the Hikes filed a petition of appeal in the district court, seeking compensation after the State exercised its power of eminent domain in 2008 to acquire 1.05 acres of the Hikes' property for an expansion of U.S. Highway 75. The parties disagreed about the value of the property taken, and the matter proceeded to a jury trial. On appeal, we affirmed the jury verdict rendered in the case.

In August 2011, before the trial in *Hike I*, the State's independent contractor began construction on the property taken from the Hikes. The contractor used heavy machinery to make a 48-foot-deep roadway cut approximately 61 feet from the

[1] *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014).

Hikes' home. That same month, Leo noticed damage to the brick veneer of the Hikes' residence.

The Hikes retained two experts to determine the cause and amount of the damage to their home. Both experts attributed the damage, estimated at $51,829, to the construction on Highway 75. After the Hikes disclosed the evidence of structural damage and that they intended to call their expert witnesses at trial, the State filed a motion in limine to exclude the evidence of damage to the residence. The court sustained the motion to preclude the Hikes from offering any evidence concerning the structural damage.

After the jury verdict, the Hikes timely appealed, alleging, among other things, that the district court erred by not allowing them to offer evidence of the structural damage. On May 9, 2014, in *Hike I*, we affirmed the district court's decision to exclude the evidence because it was "not the proximate result of the taking, but, rather, was caused by conduct that occurred after the taking" by the State.[2]

On April 17, 2015, the Hikes filed the present action claiming the same structural damage that they attempted to offer evidence of in *Hike I*. On April 19, 2016, the State filed a motion for summary judgment alleging that the Hikes' claim was barred by the 2-year statute of limitations in § 25-218. After a hearing, the court sustained the State's motion and dismissed the Hikes' complaint, finding that the claim was barred by § 25-218. The Hikes appealed.

## III. ASSIGNMENTS OF ERROR

The Hikes assign, restated and reordered, that the court erred in (1) failing to judicially estop the State from raising the statute of limitations as a defense, (2) applying § 25-218 as the relevant statute of limitations, and (3) finding that their claim was time barred despite being raised in *Hike I*.

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[2] *Id.* at 75, 846 N.W.2d at 219.

## IV. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[4]

[3] An appellate court reviews a court's application of judicial estoppel to the facts of a case for abuse of discretion and reviews its underlying factual findings for clear error.[5]

[4-6] The determination of which statute of limitations applies is a question of law.[6] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.[7] Whether a complaint states a cause of action is a question of law.[8]

[7] Appellate courts independently review questions of law decided by a lower court.[9]

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[3] *Strode v. City of Ashland*, 295 Neb. 44, 886 N.W.2d 293 (2016).

[4] *Id.*

[5] *deNourie & Yost Homes v. Frost*, 295 Neb. 912, 893 N.W.2d 669 (2017).

[6] *Lindner v. Kindig*, 293 Neb. 661, 881 N.W.2d 579 (2016).

[7] *Strode, supra* note 3.

[8] See *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 749 N.W.2d 478 (2008). See, also, *Pinnacle Bank v. Darland Constr. Co.*, 270 Neb. 978, 709 N.W.2d 635 (2006) (whether complaint states claim is reviewed de novo).

[9] *Douglas County v. Archie*, 295 Neb. 674, 891 N.W.2d 93 (2017).

## V. ANALYSIS

### 1. State Is Not Judicially Estopped From Asserting Statute of Limitations Defense

The Hikes argue that the State is judicially estopped from asserting a statute of limitations defense, because in *Hike I*, the State successfully argued that the present claim had to be brought as a separate action. The State asserts that its argument in *Hike I*, that the Hikes' evidence of structural damage was inadmissible because it was neither proximately caused by the condemnation nor relevant to the elements of a condemnation action, is not inconsistent with its current statute of limitations defense.

[8-10] Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process.[10] The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.[11] Fundamentally, the intent behind the doctrine of judicial estoppel is to prevent parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding.[12] We have held that bad faith or an actual intent to mislead on the part of the party asserting inconsistent positions must be demonstrated before the judicial estoppel doctrine may be invoked.[13]

[11] In *Hike I*, the Hikes sought to recover compensation for the State's acquisition of 1.05 acres of their property by

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[10] *deNourie & Yost Homes, supra* note 5.

[11] *Id.*

[12] *Id.*

[13] *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 291 Neb. 278, 865 N.W.2d 105 (2015). See, also, 28 Am. Jur. 2d *Estoppel and Waiver* § 68 (2011).

eminent domain. "Eminent domain is '"[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking."'"[14] The eminent domain provision of Neb. Const. art. I, § 21, prohibits the State from taking or damaging property for public use without providing just compensation therefor.[15] In a condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of the land remaining, less special benefits.[16]

While the Hikes attempted to offer evidence of the structural damage to their home at the trial on their condemnation action, they did not seek leave to amend their complaint to assert a separate claim of inverse condemnation and, instead, proceeded under their initial complaint. As a result, the trial court excluded the evidence of the structural damage.

On appeal, we held that although the Hikes may have had a remedy with respect to any such structural damage, it was not compensable in the condemnation proceeding because the damage occurred after the taking by eminent domain and the damage was not the proximate result of that taking.[17]

In this appeal, the Hikes argue that the State has taken a position inconsistent with the one they successfully and unequivocally asserted in their prior proceeding. Specifically, the Hikes argue that in *Hike I*, the State asserted that the Hikes should have properly brought their claim of structural damage as a separate action and then, in this appeal, the State

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[14] *Hike I, supra* note 1, 288 Neb. at 66, 846 N.W.2d at 213, quoting *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013), quoting Black's Law Dictionary 601 (9th ed. 2009).

[15] See *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013).

[16] *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[17] *Hike I, supra* note 1.

asserted that the separate action was time barred. However, the Hikes' contention is without merit.

In making this argument, the Hikes ignore the State's legal contentions that directly addressed why the evidence of structural damage was inadmissible. Specifically, the State contended that (1) the evidence was not relevant to the elements of the condemnation proceeding, (2) the evidence could not be shown to have been proximately caused by the condemnation, (3) the presentation of the evidence would unnecessarily delay the trial, and (4) the evidence would be prejudicial to the determination of damages for the condemnation. The district court's ruling merely determined the admissibility of the evidence in *Hike I*. It was unnecessary for the court to consider the Hikes' ability to bring their claim as a separate action at that time or in the future, nor did the court make such a ruling.

Further, the State's assertion that the Hikes' evidence of structural damage was inadmissible was not inconsistent with its current statute of limitations defense. When the court entered its order on the motion in limine on July 16, 2012, the Hikes still had more than 1 year to bring their inverse condemnation claim. Instead of timely filing an action to assert their inverse condemnation claim, the Hikes chose to pursue a remedy for the structural damage solely through an appeal. The Hikes' choice of how to proceed was not mandated by the State's assertion or the trial court's ruling.

The Hikes point to our holding in *Sports Courts of Omaha v. Meginnis*[18] to argue that they were precluded from filing a separate action while their appeal from the district court's decision in *Hike I* was pending. In *Sports Courts of Omaha*, we recognized that Nebraska case law generally holds that once an appeal has been perfected, the trial court is divested of its jurisdiction to hear a case involving the same matter

[18] *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

between the same parties.[19] However, this rule is not applicable in all circumstances, and *Sports Courts of Omaha* illustrated one such exception.[20]

In *Sports Courts of Omaha*, the plaintiff sued two defendants in the Douglas County District Court, seeking damages on a breach of a promissory note. The action was dismissed for want of prosecution, and the plaintiff appealed. While the matter was on appeal, the plaintiff sued one of the two defendants in the Lancaster County District Court in an action essentially identical to the Douglas County case. The Lancaster County District Court dismissed the action on several grounds, including that it lacked subject matter jurisdiction because of the pending appeal from Douglas County.

On appeal, we held that because the plaintiff's appeal before us involved an action maintained in a court distinct from the site of the previous action, our general rule of divested jurisdiction was inapplicable to preclude the district court's jurisdiction over the plaintiff's Lancaster County action.[21] Therefore, we determined that the Lancaster County District Court had subject matter jurisdiction to consider the plaintiff's suit against the one defendant and that the court erroneously concluded that it lacked jurisdiction to dispose of the case.[22] The Hikes' reliance on *Sports Courts of Omaha* is misplaced.

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[19] See *id.* Accord *In re Interest of Becka P. et al.*, 296 Neb 365, 894 N.W.2d 247 (2017).

[20] See *Sports Courts of Omaha, supra* note 18. See, also, *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012) (district court had jurisdiction to award temporary alimony while appeal was pending); *Russell v. Kerry, Inc.*, 278 Neb. 981, 775 N.W.2d 420 (2009) (trial judge of Workers' Compensation Court has continuing jurisdiction to enforce employer's obligation to pay benefits pending employer's appeal of previous order imposing penalty and costs for delayed payment).

[21] *Id.*

[22] *Id.*

In this matter, the Hikes had the option to file a separate action after the trial court ruled on the State's motion in limine, but they chose to wait and file an appeal instead. Further, the filing of the appeal neither precluded the Hikes from bringing a separate action for inverse condemnation nor divested the district court of subject matter jurisdiction to hear such an action.

Finally, the Hikes assert that judicial estoppel should apply because, on appeal in *Hike I*, the State maintained its contention that the evidence of structural damage should have been brought as a separate claim after the statute of limitations had run. However, our review on appeal considered only the district court's ruling in limine when it was made. Accordingly, it is irrelevant that the statute of limitations had run when the State made its argument before this court, because its argument concerned the facts in existence at the time of the district court's ruling in limine. Further, our decision rested only on the admissibility of the evidence. As a result, the existence of additional remedies available to the Hikes for their structural damage was beyond our consideration.

We conclude that the State's contentions in *Hike I* do not support the application of judicial estoppel in this appeal.

### 2. Hikes' Claim Is Barred by Statute of Limitations

#### (a) Inverse Condemnation Actions Against State Are Subject to 2-Year Statute of Limitations

[12] The Hikes argue that the district court incorrectly applied § 25-218, instead of Neb. Rev. Stat. § 25-202 (Reissue 2016), to determine the applicable statute of limitations for their inverse condemnation claim. Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.[23]

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[23] *Village of Memphis v. Frahm*, 287 Neb. 427, 843 N.W.2d 608 (2014).

The relevant portion of § 25-218 reads as follows: "Every claim and demand against the state shall be forever barred unless action is brought thereon within two years after the claim arose."

The relevant portion of § 25-202 reads as follows: "An action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages or the foreclosure of deeds of trust as mortgages thereon, can only be brought within ten years after the cause of action accrues."

First, the Hikes contend that the application of § 25-218 in *Bordy v. State*[24] and *Czarnick v. Loup River P. P. Dist.*[25] has been superseded by the application of § 25-202 in *Krambeck v. City of Gretna*[26] and *Steuben v. City of Lincoln*[27] to inverse condemnation claims. Second, they assert that § 25-202 should apply, because it is more specific to claims of inverse condemnation than § 25-218.

The State contends that *Krambeck* and *Stueben* are distinguishable from this current appeal, because those cases did not involve claims against the State. It also contends that § 25-218 is more specific than § 25-202, because the inverse condemnation claim herein is against the State.

In *Bordy* and *Cznarick*, we held that under § 25-218, a suit against the State for the taking or damaging of private property for public use must be commenced within 2 years from the time the taking or damaging of the property occurred.[28] In *Krambeck* and *Stueben*, we held that actions commenced under article I, § 21, are subject to a 10-year statute of limitations under § 25-202.[29]

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[24] *Bordy v. State*, 142 Neb. 714, 7 N.W.2d 632 (1943).

[25] *Czarnick v. Loup River P. P. Dist.*, 190 Neb. 521, 209 N.W.2d 595 (1973).

[26] *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977).

[27] *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996).

[28] See *Bordy, supra* note 24, and *Czarnick, supra* note 25.

[29] See *Krambeck, supra* note 26, and *Steuben, supra* note 27.

All four cases cited by the parties concerned the applicable statute of limitations for inverse condemnation actions. While *Krambeck* and *Stueben* are more recent, the State is correct in its contention that they are factually distinguishable from *Bordy*, *Czarnick*, and the instant case. The inverse condemnation actions in *Krambeck* and *Stueben* were instituted against a local power district and a city, respectively, not the State. Because the actions in *Krambeck* and *Stueben* were not against the State, § 25-218 did not apply by its express terms and, as a result, we did not address that statute.

Nevertheless, we recognize that in *Bordy* and *Czarnick*, we did not expressly analyze whether § 25-202 should apply over § 25-218. Accordingly, we consider the parties' arguments concerning the applicable statute of limitations here.

[13] In determining which statute of limitations applies in a particular case, we have established the principle that a special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject matter.[30]

[14] Though article I, § 21, is a self-executing provision of the Constitution, which authorizes a landowner to bring an action in inverse condemnation,[31] it is enforced procedurally through the eminent domain statutes.[32] However, in *Krambeck*, we recognized that our eminent domain statutes do not provide a special statute of limitations, so we explained that "'[i]n the absence of special statutory provisions regulating the time within which an owner must pursue his remedy, the time

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[30] See *Wendeln v. Beatrice Manor*, 271 Neb. 373, 712 N.W.2d 226 (2006). See, also, *Schaffer v. Cass County*, 290 Neb. 892, 863 N.W.2d 143 (2015) (where general and special provisions of statutes are in conflict, general law yields to special provision or more specific statute).

[31] *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994), *disapproved on other grounds, Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008).

[32] See Neb. Rev. Stat. § 76-701 et seq. (Reissue 2009 & Cum. Supp. 2016).

prescribed by the general statutes of limitations will ordinarily apply . . . .'"[33]

Accordingly, we considered which of two general statutes of limitations should govern inverse condemnation actions.[34] While § 25-202 provides that an action for the recovery of the title or possession of lands can only be brought within 10 years after the cause of action accrues, § 25-206 provides, in part, that "[a]n action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within four years."

We determined that § 25-206, which is explicitly limited in its application to "liabilities created by statute," could not apply to eminent domain actions, because the City's liability was not a statutorily created one, but a constitutional one pursuant to article I, § 21.[35]

We then explained that inverse condemnation actions are "analogous to an action by a private landowner against another private individual or entity to recover the title to or possession of property," but, because the power of eminent domain precludes the property owner from compelling the return of the property taken, the owner is entitled to just compensation as a substitute.[36] Accordingly, an action seeking damages for inverse condemnation is limited only by the 10-year time period required to establish title by adverse possession.[37]

[15,16] Consequently, § 25-202 is not a special statute of limitations, but only a general statute of limitations. While § 25-218 is also not a special statute of limitations for any specific type of claim, when the State is a defendant to a

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[33] *Krambeck, supra* note 26, 198 Neb. at 611, 254 N.W.2d at 693, quoting 30 C.J.S. *Eminent Domain* § 415 (1965).

[34] See § 25-202 and Neb. Rev. Stat. § 25-206 (Reissue 2016).

[35] *Krambeck, supra* note 26, 198 Neb. at 612, 254 N.W.2d at 694.

[36] *Id.* at 614, 254 N.W.2d at 695.

[37] *Id.*

claim, it is a specific expression of the Legislature's will regarding the timeframe to bring such a claim.

[17] As a result of our analysis, we hold that the 2-year statute of limitations in § 25-218 is the applicable statute of limitations for claims of inverse condemnation against the State because § 25-218 is more specific on the subject than is § 25-202.

(b) Hikes Did Not Bring Their Claim Within 2 Years

The Hikes argue that even if § 25-218 is the applicable statute of limitations, they brought their claim within 2 years of its accrual by asserting it in *Hike I*. The Hikes' argument, however, is based on an incorrect understanding of what it means to bring an action.

[18] Bringing an action means to sue or institute legal proceedings.[38] Here, where the Hikes had already had an action pending under a condemnation claim, it would have meant seeking permission of the trial court to amend their complaint to add a claim of inverse condemnation. Instead, as mentioned above, the Hikes attempted to introduce evidence of structural damage to recover as part of the condemnation proceeding.

The Hikes did not bring their inverse condemnation action, by asserting the claim in a complaint, until April 17, 2015. Further, the district court's finding that the Hikes' cause of action accrued in August 2011, more than 3 years before the Hikes brought their claim, was not clearly wrong. Therefore, the Hikes claim of inverse condemnation is barred by the 2-year statute of limitations.

(c) Hikes' Constitutional Argument Was Not Properly Raised

In their reply brief, the Hikes contend that they have an unequivocal right to compensation for the damage caused by

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[38] Black's Law Dictionary 231 (10th ed. 2014).

the State under article I, § 21, because their rights thereunder are self-executing. However, the Hikes did not assign such as error in their initial brief.

[19,20] As we explained in *Hike I*, errors argued but not assigned will not be considered on appeal. Further, even if the argument could be construed as fitting into one of the Hikes' assigned errors, the purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.[39] The Hikes' attempt to make the argument for the first time in their reply brief is untimely.[40]

## VI. CONCLUSION

We conclude that the 2-year statute of limitations period set forth in § 25-218 governs inverse condemnation actions against the State. We determine that the district court did not err when it granted summary judgment for the State based on its determination that the Hikes' claim is barred by the 2-year statute of limitations.

Affirmed.

Cassel, J., participating on briefs.

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[39] *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014).

[40] See *id.*

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Erick F. Vela, appellant.

900 N.W.2d 8

Filed July 21, 2017. No. S-16-465.

1. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
2. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
3. **Postconviction: Constitutional Law: Judgments.** Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable.
4. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
5. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
6. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by the same

counsel, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.

8. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
9. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
10. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.
11. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.
12. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
13. **Trial: Juries.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court.
14. **Juries: Discrimination: Appeal and Error.** An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law.
15. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

Patrick P. Carney, of Carney Law, P.C., for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ., and Inbody, Judge.

Miller-Lerman, J.

## NATURE OF CASE

Erick F. Vela appeals the order of the district court for Madison County which overruled his motion for postconviction relief without an evidentiary hearing. He claims the district court erred when it rejected six of his claims of ineffective assistance of counsel. He also asks this court to consider an additional claim that was not presented to or passed upon by the district court. We affirm the district court's order.

## STATEMENT OF FACTS

On June 12, 2003, Vela pled guilty to the murders of Lisa Bryant, Lola Elwood, Jo Mausbach, Evonne Tuttle, and Samuel Sun. The five victims had been killed during an attempted bank robbery carried out by Vela and two other men, Jorge Galindo and Jose Sandoval, in Norfolk, Nebraska, on September 26, 2002. Vela pled guilty to five counts of first degree murder and five counts of use of a deadly weapon to commit a felony. He also pled guilty to counts of burglary, robbery, and use of a deadly weapon to commit a felony related to the forcible entry into a home and the theft of a vehicle, which occurred after the men left the bank.

The State sought the death penalty, and an aggravation hearing was held in which a jury found the existence of five statutory aggravating circumstances for each of the five murders. After a sentencing hearing, a three-judge panel imposed the death penalty for each of the five murders. We affirmed Vela's sentences on direct appeal. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

On January 7, 2014, Vela filed an amended motion for postconviction relief in the district court. Because Vela was represented by the same counsel at trial and on direct appeal, this postconviction proceeding was his first opportunity to assert that he received ineffective assistance of counsel. Vela's motion raised numerous claims of ineffective assistance of trial and appellate counsel. The district court overruled Vela's motion for postconviction relief without an evidentiary hearing.

Vela appealed the denial to this court in case No. S-14-557. In a memorandum opinion, we concluded that the district court had used an incorrect standard to determine whether an evidentiary hearing was required on Vela's postconviction claims. *State v. Vela*, 290 Neb. xvii (No. S-14-557, May 8, 2015). We therefore vacated the order and remanded the cause to the district court for reconsideration of Vela's motion using the correct standard.

On remand, the district court filed an order on April 12, 2016, in which it recited a standard consistent with the standard set forth in our memorandum opinion. The district court then considered and rejected each of Vela's claims for postconviction relief and concluded that no evidentiary hearing was required on any of the claims. The court therefore overruled Vela's motion for postconviction relief and his request for an evidentiary hearing.

Vela appeals the district court's order overruling his motion for postconviction relief without an evidentiary hearing. In this current appeal, Vela assigns error to the district court's rejection of six of his claims. Further details regarding those six claims, the facts related thereto, and the district court's analysis of those claims are set forth in our analysis below.

## ASSIGNMENTS OF ERROR

Vela claims that the district court erred when it denied postconviction relief without an evidentiary hearing on the following claims of ineffective assistance of trial and appellate

counsel: (1) Counsel deterred Vela from entering a guilty plea early in the case; (2) counsel failed to timely discover and adequately challenge the existence of a personal relationship between a prosecutor and the presiding juror; (3) counsel failed to assign error on direct appeal to the trial court's overruling of Vela's challenges based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); (4) counsel failed to allow the State's expert to conduct testing on Vela to determine his level of intellectual ability; (5) counsel failed to request that a definition of malice be included in the jury instruction setting forth aggravating circumstances; and (6) counsel failed to offer evidence to negate a finding of malice.

[1] In addition, Vela asks this court to consider a claim that, he asserts, presents clear error. Vela claims that he received ineffective assistance of counsel because counsel failed, both at trial and on direct appeal, to challenge the constitutionality of Nebraska's capital sentencing statutory scheme on the basis that it allows a panel of judges, rather than a jury, to determine mitigating circumstances and to weigh aggravating circumstances against mitigating circumstances. Vela's arguments in this regard are based in large part on the opinion of the U.S. Supreme Court in *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), which was filed January 12, 2016. Vela acknowledges that this claim was not raised in his motion for postconviction relief and was not considered by the district court. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016). We therefore do not consider this claim in this appeal.

## STANDARD OF REVIEW

[2] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files

affirmatively show that the defendant is entitled to no relief. *State v. Watson*, 295 Neb. 802, 891 N.W.2d 322 (2017).

## ANALYSIS

Vela claims, generally, that the district court erred when it denied his postconviction motion without an evidentiary hearing and, specifically, when it rejected six of his claims. Therefore, before reviewing the merits of Vela's specific claims, we review general standards relating to postconviction relief.

[3-6] Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable. *State v. Watson, supra*. Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *Id*. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *Id*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

[7] Vela's postconviction claims center on the alleged ineffective assistance provided by his trial counsel, who was also his counsel on direct appeal. When a defendant was represented both at trial and on direct appeal by the same counsel, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief. *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[8,9] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair

trial. *State v. Watson, supra*. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *Id*. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *Id*. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *Id*.

[10-12] Vela claims that in certain respects counsel was ineffective on direct appeal as well as at trial. A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review. *State v. Ely, supra*. When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel actually prejudiced the defendant. *Id*. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise. *Id*. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *State v. Starks*, 294 Neb. 361, 883 N.W.2d 310 (2016).

With these standards in mind, we review Vela's specific claims.

*First Claim: Timing of Plea.*

In his amended motion for postconviction relief, Vela claimed that his counsel's performance was deficient because counsel failed to advise him to plead guilty to all counts at an earlier stage of the proceedings against him. The information against Vela was filed on October 31, 2002, and he

pled guilty on June 12, 2003. Vela asserted that he missed out on various strategic advantages because he did not plead guilty sooner.

First, Vela stated that on November 22, 2002, the Governor signed 2002 Neb. Laws, L.B. 1, which was enacted in response to the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Vela argued that if he had pled guilty prior to the effective date of L.B. 1, he would not have been subject to the death penalty, because Nebraska had no effective death penalty at that time.

Second, Vela noted that even after the enactment of L.B. 1, which required, inter alia, that the prosecutor allege aggravating circumstances in the information charging first degree murder, the prosecutor in this case did not actually amend the information to allege aggravating circumstances until January 29, 2003. Vela argued that if he had pled guilty prior to the amendment, the death penalty would not have been available, because the information in effect at that time did not allege aggravating circumstances.

Finally, Vela noted that on March 17, 2003, the body of Travis Lundell was found; Lundell was the victim of a separate homicide in which Vela was involved. Vela contends that the discovery of Lundell's body and Vela's implication in the homicide disadvantaged him in two ways in regard to capital sentencing. First, evidence of the Lundell homicide supported the finding of the aggravating circumstance set forth in Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 2008), that he had "a substantial prior history of serious assaultive or terrorizing criminal activity," upon which aggravating circumstance finding the three-judge panel placed substantial importance when it sentenced him to death. Second, the three-judge panel discounted the importance of Vela's guilty plea as a mitigating circumstance, because the panel determined that one reason Vela entered his plea was because a codefendant had cooperated with authorities in connection with the Lundell

homicide. Vela argued that if he had pled guilty before Lundell's body was found, evidence of the other homicide could not have been used either to support an aggravating circumstance or to diminish the mitigating effect of his guilty plea.

Vela summarized this claim by arguing that if counsel had advised or allowed him to plead guilty at an earlier stage of the proceedings, the above-enumerated events, which occurred prior to the entry of his plea, would not have disadvantaged him with respect to the imposition of the death penalty.

The district court rejected each aspect of Vela's claim that counsel was ineffective with regard to the timing of his plea. With regard to the enactment of L.B. 1, the court noted that in Vela's direct appeal, we had rejected a similar argument and stated that "the death penalty did not disappear from Nebraska law during the approximately 5-month period between the decision in *Ring* and the enactment of L.B. 1." *State v. Vela*, 279 Neb. 94, 109-10, 777 N.W.2d 266, 282 (2010). With regard to the allegation of aggravating circumstances in the information, the district court noted that we addressed the issue in the direct appeal of one of Vela's codefendants, determining that the notice of aggravation was a procedural rule that did not apply to pending litigation and that therefore, no error stemmed from the fact the original information filed by the State did not contain a notice of aggravation. See *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

With regard to the discovery of Lundell's body, the court noted that it was mere speculation that Vela's counsel knew about Vela's involvement in the Lundell homicide prior to the discovery of the body. The court further noted that the jury found five aggravating circumstances in connection with each of the homicides in this case; the court determined that the four other aggravating circumstances were sufficient to support imposition of the death penalty and that it would be mere speculation to say that the death penalty would not have been imposed if not for the aggravating circumstance supported by evidence of the Lundell homicide.

With regard to the importance of his plea as a mitigating circumstance, the court similarly determined that it was mere speculation as to whether counsel knew a codefendant would cooperate with authorities in connection with the Lundell homicide. The court also noted that there were other factors that diminished the value of Vela's plea as a mitigating circumstance.

We agree with the district court's reasoning. With regard to Vela's first two arguments, our holdings in *State v. Vela, supra*, and *State v. Galindo, supra*, undermine Vela's allegation that he would not have been subject to the death penalty if counsel had advised him to enter a plea at an earlier date. In *Vela*, we rejected Vela's argument that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), effectively invalidated Nebraska's death penalty scheme and that Nebraska had no effective death penalty until L.B. 1 was enacted. We stated instead that "[b]efore, during, and after that period, Nebraska statutes provided that the maximum penalty for first degree murder was death." *State v. Vela*, 279 Neb. at 110, 777 N.W.2d at 282. In *Galindo*, we rejected the defendant's arguments that L.B. 1 required that the original information contain a notice of aggravation and that because the original information filed against him did not contain a notice of aggravation, he could not be sentenced to death. We noted that at the time the original information was filed against the defendant in *Galindo*, the statutory scheme did not require such notice and that the information was amended after the enactment of L.B. 1. We concluded that the notice of aggravation was a new procedural rule that had no retroactive effect on steps taken in an action before the statute took effect, and we therefore found "no error stemming from the fact that the original information did not contain a notice of aggravation." *State v. Galindo*, 278 Neb. at 628, 774 N.W.2d at 219. Based on these holdings in *Vela* and *Galindo*, we determine that Vela failed to demonstrate any prejudice resulting from counsel's failure to urge him to enter a plea

prior to the enactment of L.B. 1 or the filing of the amended information against him.

With regard to the discovery of Lundell's body, we have reviewed the record and note that the sentencing panel relied on Vela's killing of Lundell to establish the aggravating circumstance that he had "a substantial prior history of serious assaultive or terrorizing criminal activity" under § 29-2523(1)(a) and that the sentencing panel stated that such aggravating circumstance "should be given the greatest weight, and it is of such a magnitude, that it alone is dispositive and outweighs all of the non-statutory mitigating circumstances." The sentencing panel also referred to certain facts related to the Lundell killing as reasons it did not find remorse to be a mitigating factor.

The record indicates that the Lundell killing played an important role in the panel's decision to impose the death penalty, and therefore, it is possible that the discovery of Lundell's body prejudiced Vela in this action. However, Vela cannot show that his trial counsel's performance was deficient for failing to advise him to enter a plea before Lundell's body was discovered. As the district court noted, Vela's claim required speculation that counsel knew of Vela's involvement in Lundell's killing before the body was discovered. A conclusion that counsel's performance was deficient would also require counsel to somehow know that Lundell's body would be discovered and when it would be discovered and to control the progress of the case to the extent that Vela would be convicted and sentenced before the body was discovered. Given the speculative nature of Vela's claim and the hypothetical circumstances just recited, we could not say that counsel's performance was deficient based on a failure to convince Vela to enter a plea before the body was discovered.

We find no merit to this claim, and we therefore conclude that the district court did not err when it rejected this claim without an evidentiary hearing.

*Second Claim: Relationship of Prosecutor and Juror.*

In his amended motion for postconviction relief, Vela claimed that his counsel's performance was deficient because counsel failed to timely discover and to adequately challenge the existence of a personal relationship between a prosecutor and the presiding juror in the aggravation phase of the trial. Vela alleged that during jury voir dire, his counsel failed to ask R.S., a member of the venire who would eventually become the presiding juror, whether he knew any of the lawyers in the case, and that it was not until R.S. submitted a question to the court during jury deliberations that the prosecutor told Vela's defense counsel that R.S. was the prosecutor's pastor. Vela alleged that his counsel failed to move for a mistrial or for a new trial on the basis of the relationship between the prosecutor and the presiding juror and on the basis of the prosecutor's failure to timely disclose the relationship during jury selection. Vela further alleged that his counsel also failed to raise the issue on direct appeal. Vela argued that these failures of counsel prejudiced him, because if counsel had properly raised a challenge, the trial court would have declared a mistrial or granted a new trial or this court would have reversed his death sentences on appeal.

In its order denying postconviction relief, the district court noted that during the jury voir dire, R.S. responded to the court's questions by indicating that he could take an oath to sit as a fair and impartial juror and that he was not aware of any bias or prejudice for or against either side. The district court noted that R.S. had similarly responded to a question by the prosecutor by indicating that he could listen to the evidence and the law given by the judge. The court further noted that Vela's defense counsel had asked R.S., "'because of the relationship you have with the community as a minister, whether or not you would feel uncomfortable facing your congregation or other members of the community if you were the one person who said, no, the State didn't meet [its] burden'" and whether

R.S. "'would vote your conscious [sic] regardless of what the rest of the pack had in mind.'" R.S. responded to defense counsel's questions by indicating that he would not feel uncomfortable in that situation and that he would do what he felt was warranted. The postconviction court further noted that Vela did not allege that defense counsel would have struck the potential juror if counsel had known of the relationship nor did Vela allege the extent of the pastoral relationship between the juror and the prosecutor. The district court concluded that Vela was not entitled to postconviction relief on this claim.

[13] We agree that Vela's allegations do not show prejudice as a result of counsel's failure to challenge or strike the juror. The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court, see *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009), and Vela alleges nothing more than the conclusion that R.S.' pastoral relationship to the prosecutor indicates that R.S. could not have been fair and impartial. Given R.S.' statements during voir dire that he could be fair and impartial, that he was not aware of any bias or prejudice on his own part, and that his role as a minister in the community would not affect his decisions as a juror, the court would not have abused its discretion if it had rejected a challenge made against R.S. Furthermore, it is mere speculation whether counsel would have used a peremptory strike on R.S. rather than on other potential jurors if counsel had known of the relationship, and it is further speculation whether a different juror would have changed the result of the trial. Vela has not shown prejudice with respect to this claim.

We find no merit to this claim, and we therefore conclude that the district court did not err when it rejected this claim without an evidentiary hearing.

*Third Claim: Appeal of*
Batson *Rulings.*

In his amended motion for postconviction relief, Vela claimed that his counsel's performance was deficient because

counsel failed to assign error on direct appeal to the trial court's overruling of Vela's *Batson* challenges. Vela alleged that during peremptory strikes, the prosecutor struck the only Hispanic juror and the only African-American juror on the venire. Vela objected to the strikes on the basis of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (holding that prosecutor's privilege to strike individual jurors through peremptory challenges is subject to commands of Equal Protection Clause). Vela alleged that the prosecutor gave reasons for both strikes and that the trial court overruled defense counsel's objections. Vela claimed that he was prejudiced when counsel failed to challenge these rulings on direct appeal because this court "would have reversed Vela's death sentences and remanded the case to the district court for a new aggravation trial."

In its order denying postconviction relief, the district court noted that after Vela had challenged the strikes and pointed out that the potential jurors were, respectively, the only Hispanic and the only African-American on the venire, the burden shifted to the State to articulate race-neutral bases for striking the jurors. The court determined that the reasons given by the prosecutor, which the record shows generally went to personality traits and prior prosecutions of both potential jurors, met this burden and that defense counsel had "'no argument'" in response. The postconviction court determined that "[i]n the face of the race-neutral reason provided by the Madison County Attorney," it was not deficient performance for appellate counsel to not raise the issue on direct appeal and that there was not a substantial probability that the appellate court would have found error in the rulings. The district court concluded that Vela was not entitled to postconviction relief on this claim.

[14,15] An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015). An appellate court

reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory. *Id*. Given these standards of review, the prosecutor's race-neutral explanations, and the trial court's reasons for rejecting Vela's *Batson* challenges, we conclude that there was not a reasonable probability that inclusion of this issue in Vela's direct appeal would have changed the result of the appeal. Therefore, counsel's failure to raise the issue on appeal was not ineffective assistance. See *State v. Starks*, 294 Neb. 361, 883 N.W.2d 310 (2016).

We find no merit to this claim, and we therefore conclude that the district court did not err when it rejected this claim without an evidentiary hearing.

*Fourth Claim: Intellectual Functioning.*

In his amended motion for postconviction relief, Vela generally claimed that his counsel's performance was deficient because counsel failed to adequately present a case to show that Vela was "mentally retarded," which would have precluded imposition of the death penalty. Among the specific failures of which Vela complained, Vela alleged that his counsel failed to allow the State's expert to conduct testing on Vela to fully determine his level of intellectual ability.

Vela alleged that after testing showed that his IQ was 75, which the trial court found established "the first statutory element of mental retardation," the State retained Dr. Leland Zlomke to further evaluate Vela. Vela alleged that Zlomke wanted to administer adaptive behavior testing but that Vela's counsel did not allow Zlomke to administer the test. Vela alleged that although the trial court found the first prong of the test for "mental retardation" was presented based on Vela's IQ of 75, the court was not warranted in finding that the second prong, "limitations in adaptive functioning," was not shown. Vela alleged that if his counsel had allowed Zlomke to administer adaptive behavior testing, the results would have shown

that he had significant limitations in adaptive functioning in at least two of the relevant skill areas and that the court would have found that the second prong of the test for "mental retardation" had been established.

In its order denying postconviction relief, the district court rejected Vela's claims regarding counsel's failure to utilize experts to adequately establish his diminished mental capacity. The district court reviewed the testing done by several experts, including those retained at Vela's request and those retained at the State's request. The district court specifically rejected Vela's allegation that his counsel had refused to allow Zlomke to perform adaptive behavior testing on Vela. The court cited to our opinion in Vela's direct appeal and stated that the "record reflects that Zlomke had the opinion that Vela's overall adaptive behavior was appropriate for his age." The court concluded that this claim did not entitle Vela to postconviction relief.

In one of the portions of our opinion in Vela's direct appeal that was cited by the district court, we stated:

> Utilizing two third-party informants who were acquainted with Vela for 2 to 3 months prior to his arrest, Zlomke administered a standardized test known as Scales of Independent Behavior-Revised to assess Vela's adaptive behavior. As a result of this testing, Zlomke concluded that while Vela had limitations in certain adaptive skill areas, his overall adaptive behavior was appropriate for his age.

*State v. Vela*, 279 Neb. 94, 137, 777 N.W.2d 266, 299 (2010). In another cited portion, we stated, "The district court's finding that Vela failed to prove significant deficits in adaptive behavior is supported by substantial evidence. . . . Zlomke administered a modified adaptive behavior test based on interviews with Vela's acquaintances and concluded that Vela fell within the average range of adaptive functioning." *Id.* at 151-52, 777 N.W.2d at 308. These portions of our opinion in Vela's direct appeal show that even if Vela's allegation that his

counsel prevented Zlomke from performing adaptive testing on Vela is true, such action by counsel did not prejudice Vela, because Zlomke was able to use alternative means to evaluate Vela's adaptive behavior and Zlomke concluded that Vela's overall adaptive behavior was appropriate.

We note for completeness that during the pendency of this appeal, the U.S. Supreme Court decided *Moore v. Texas*, 581 U.S. 1, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017), in which it concluded that a state court had relied on superseded medical standards when it evaluated the defendant's adaptive functioning as a factor in determining whether the defendant's IQ of 74 warranted a finding that he was intellectually disabled. In the present case, Vela challenged the effectiveness of counsel based on his allegation that counsel completely prevented an evaluation of his adaptive functioning. Vela did not challenge the appropriateness of specific standards or methods that were used to evaluate his adaptive functioning, and therefore, consideration of that question is not before us in this appeal.

We find no merit to this claim, and we therefore conclude that the district court did not err when it rejected this claim without an evidentiary hearing.

*Fifth and Sixth Claims: Definition of Malice and Evidence to Negate Malice.*

In his amended motion for postconviction relief, Vela claimed that his counsel's performance was deficient because counsel failed to request a jury instruction defining "malice" in connection with the aggravating circumstance of Lundell's murder which served as evidence under § 29-2523(1)(a) which generally concerns a defendant's prior assaultive behavior and terrorizing criminal activity. He also claimed that counsel's performance was deficient because counsel failed to present evidence to negate a finding of malice with regard to such aggravating circumstance.

More particularly, Vela claimed that in support of the aggravating circumstance set forth in § 29-2523(1)(a), the State alleged that Vela had a history of serious assaultive or terrorizing criminal activity and that it presented evidence of the Lundell homicide to support that allegation. Vela claimed that there was evidence available to defense counsel which would show that Vela did not kill Lundell with malice and that instead he was threatened and coerced by a codefendant. He also alleged that evidence of his diminished intellectual functioning would negate any finding of malice in connection with the killing of Lundell.

The district court concluded that Vela was not entitled to postconviction relief on either the claim related to a malice instruction or the claim related to evidence to negate a finding of malice. The district court stated that the aggravating circumstance set forth in § 29-2523(1)(a) "involves a review of [a] defendant's past criminal and assaultive terrorizing history" but that "[i]t does not involve a review of whether or not a defendant had the mental capacity to commit other crimes or engage in assaultive or terrorizing activity in the past."

The court also noted that in Vela's direct appeal, he had claimed that the failure to instruct the jury on the definition of malice in connection with the aggravating circumstance was plain error. We rejected this claim in the direct appeal and stated that "contrary to Vela's argument, we find no evidence in the record suggesting the absence of malice in the form of legal justification or excuse for the Lundell killing." *State v. Vela*, 279 Neb. 94, 117, 777 N.W.2d 266, 287 (2010). We further stated in our opinion in his direct appeal that Vela was not on trial for the murder of Lundell and instead that "Vela's involvement in the Lundell murder was simply the evidence by which the State sought to prove aggravating circumstance § 29-2323(1)(a), a 'substantial prior history of serious or assaultive terrorizing criminal activity' prior to the five murders for which he had been convicted." 279 Neb. at 118, 777 N.W.2d at 287.

As the district court in this postconviction action reasoned, even if the jury in this case had found that Vela did not kill Lundell with malice, there was still evidence that Vela had killed Lundell and was guilty of some lesser form of homicide. Regardless of the degree of homicide, such evidence supported a finding of the existence of the aggravating circumstance in § 29-2523(1)(a) of "a substantial prior history of serious or assaultive terrorizing criminal activity." Also, there was no reason to think the sentencing panel would have given less weight to the aggravating circumstance of Lundell's murder or would have decided against the death penalty if the Lundell killing were found to be a lesser homicide. Therefore, Vela's allegations do not show how he was prejudiced by counsel's alleged failures to request an instruction on malice and to present evidence to negate a finding of malice in connection with Lundell's murder which served as an aggravating circumstance.

We find no merit to these claims, and we therefore conclude that the district court did not err when it rejected these claims without an evidentiary hearing.

## CONCLUSION

For the reasons set forth above, we determine that with respect to each of Vela's claims, the district court did not err when it concluded that Vela failed to allege sufficient facts to demonstrate a violation of his constitutional rights and that the record and files affirmatively show that he is entitled to no relief. We conclude that the district court did not err when it overruled Vela's motion for postconviction relief without an evidentiary hearing. Accordingly, we affirm the order of the district court.

Affirmed.

Heavican, C.J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Applied Underwriters, Inc., a Nebraska corporation, and Applied Risk Services, Inc., appellants, v. S.E.B. Services of New York, Inc., a New York corporation, and 20th Century Services of New York, Inc., a New York corporation, appellees.

898 N.W.2d 366

Filed July 21, 2017. No. S-16-496.

1. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
2. **Moot Question: Jurisdiction: Appeal and Error.** Mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, and an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
3. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
4. **Jurisdiction: Judgments.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
5. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.
6. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.
7. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
8. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.

9. ____. The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.
10. **Parties: Standing.** The question of standing can be raised by any party, or the court, at any time during the proceeding.
11. **Standing: Jurisdiction: Parties.** Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.
12. **Standing: Words and Phrases.** Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.
13. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.
14. **Standing: Jurisdiction: Proof.** A party invoking a court's or tribunal's jurisdiction bears the burden of establishing the elements of standing.
15. **Pleadings: Standing.** At the pleading stage, the standard for determining the sufficiency of a complaint to allege standing is fairly liberal.
16. **Actions: Breach of Contract.** As a general rule, one who is neither a party to a contract nor an agent of a party to a contract has no rights under the contract, and cannot bring an action for breach thereof.
17. **Standing: Jurisdiction.** The defect of standing is a defect of subject matter jurisdiction. And when questions relating to both subject matter jurisdiction and personal jurisdiction are present in a case, the court must first determine the question of subject matter jurisdiction.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

Jeffrey A. Silver for appellants.

Stephen M. Bruckner and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

Applied Underwriters, Inc. (Applied), and Applied Risk Services, Inc. (ARS), appeal from an order dismissing their breach of contract action against S.E.B. Services of New York,

Inc., and 20th Century Services of New York, Inc. (collectively S.E.B.). The district court dismissed the action for lack of personal jurisdiction over S.E.B. and alternatively found that Nebraska was an inconvenient forum. We affirm the dismissal, but on different grounds.

## FACTS

Applied is a Nebraska corporation located in Omaha, Nebraska. It markets and administers workers' compensation insurance programs nationwide. S.E.B. is a New York corporation with its principal place of business in New York. S.E.B. provides security services and security guards in at least 22 states.

In 2014, S.E.B.'s third-party insurance broker contacted Applied to discuss obtaining workers' compensation coverage for S.E.B. Subsequently, S.E.B. entered into a "Reinsurance Participation Agreement" (RPA) with Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRAC). AUCRAC is not a party to this litigation. A "true and accurate copy" of the RPA was attached to the complaint in this matter. Paragraph 8 of the RPA recites that ARS is the "billing agent" for AUCRAC and is authorized "to account for, offset and true up any and all amounts due . . . and owing" under the RPA.

The RPA provides workers' compensation coverage through what it describes as a "segregated protected cell reinsurance program" established by AUCRAC. The details of the program are complex but irrelevant for purposes of resolving this appeal. In general, according to the RPA, AUCRAC is part of a "Reinsurance Treaty" composed of several "Issuing Insurers" that participate in a pooling arrangement and collectively issue the workers' compensation coverage afforded under the RPA.

From November 2014 through August 2015, S.E.B. reported payroll information to Applied in Omaha, and Applied used the information to calculate S.E.B.'s premium payments under the RPA. Initially, Applied withdrew amounts for premium

payments directly from S.E.B.'s bank account in New York via electronic debits, but at some point, S.E.B. became dissatisfied with that arrangement and terminated the automatic debits.

S.E.B. fell behind on the required premium payments, and on May 5, 2015, the president of S.E.B. executed a promissory note in favor of "Applied . . . and its affiliates and subsidiaries" in the amount of $42,362.59, payable in monthly installments. The record shows the promissory note was paid in full on December 22, 2015.

On October 26, 2015, Applied and ARS filed suit against S.E.B. in the district court for Douglas County. In count I of the complaint, Applied alleged S.E.B. breached the promissory note and sought recovery of $8,144.27. In count II, ARS alleged S.E.B. breached the RPA between AUCRAC and S.E.B., and it sought recovery of $752,926.98.

On November 30, 2015, S.E.B. filed a motion to dismiss the complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(2) (lack of personal jurisdiction), (b)(6) (failure to state claim upon which relief could be granted), and (b)(7) (failure to join necessary party). S.E.B.'s motion also alleged dismissal was appropriate under Neb. Rev. Stat. § 25-538 (Reissue 2016), which provides: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just."

A hearing on the motion to dismiss was held January 8, 2016. The district court received three affidavits for the limited purpose of ruling on the motion to dismiss for lack of personal jurisdiction. In addition, the court took judicial notice of the case file.

In an order entered May 9, 2016, the district court dismissed the action for lack of personal jurisdiction and, alternatively, on the ground that Nebraska was an inconvenient forum. Applied and ARS timely appealed, and we moved the case to our docket on our own motion pursuant to our statutory

authority to regulate the caseloads of the appellate courts of this state.[1]

## ASSIGNMENTS OF ERROR

Applied and ARS assign, restated and summarized, that the district court erred in (1) finding it lacked personal jurisdiction over S.E.B. under Nebraska's long-arm statute, (2) declaring the forum selection provisions of the RPA unenforceable, and (3) finding Nebraska was not a reasonably convenient place for trial.

## SUPPLEMENTAL BRIEFING

After hearing oral arguments in this case, we directed the parties to submit supplemental briefing on two issues: (1) whether the promissory note had been paid in full, rendering the appeal on count I moot, and (2) whether Applied and/or ARS had standing to bring the claim alleged in count II when neither was a party to the RPA.

[1] Having reviewed the parties' supplemental briefing, we find the issues of mootness and standing are dispositive. As such, we do not address the original assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[2]

## STANDARD OF REVIEW

[2] Mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, and an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.[3]

[3] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.[4]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[2] *State v. Senn*, 295 Neb. 315, 888 N.W.2d 716 (2016); *State v. Planck*, 289 Neb. 510, 856 N.W.2d 112 (2014).

[3] See *Al-Ameen v. Frakes*, 293 Neb. 248, 876 N.W.2d 635 (2016).

[4] *In re Application A-18503*, 286 Neb. 611, 838 N.W.2d 242 (2013).

[4] A jurisdictional issue that does not involve a factual dispute presents a question of law.[5]

## ANALYSIS

### Claim on Promissory Note Is Moot

In count I of its complaint, Applied alleges S.E.B. failed to pay amounts due under the promissory note and $8,144.27 remains due and owing. The record from the hearing on S.E.B.'s motion to dismiss indicates the promissory note was paid in full in December 2015, after the lawsuit was filed. The parties acknowledged this fact at oral argument and confirmed it in supplemental briefing to this court.

[5-8] A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.[6] Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.[7] Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.[8] As a general rule, a moot case is subject to summary dismissal.[9]

[9] Applied argues that count I should not be considered moot because, when the complaint was filed, S.E.B. owed sums on the promissory note. But the central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any

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[5] *Id.*

[6] *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[7] *Id.*; *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200, 803 N.W.2d 17 (2011).

[8] *Blakely v. Lancaster County, supra* note 6.

[9] *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000).

occasion for meaningful relief.[10] Here, the record and the judicial admissions of the parties demonstrate such changes in circumstances have occurred since the action was filed. By the time of the hearing on the motion to dismiss, the promissory note had been paid and there was no money remaining due. These changes effectively forestalled any occasion for meaningful relief on count I, rendering the claim moot.

Although the district court's dismissal was premised on lack of personal jurisdiction, we conclude count I is moot and we affirm the dismissal on that basis.

## No Standing to Bring Claim for Breach of RPA

[10] The named plaintiffs in this action are Applied and ARS; neither entity is a party to the RPA which S.E.B. is alleged to have breached. We ordered supplemental briefing on the issue of whether Applied and ARS have standing to assert a claim that S.E.B. breached the RPA. The question of standing can be raised by any party, or the court, at any time during the proceeding.[11]

[11-15] Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.[12] Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.[13] To have standing, a litigant must assert the litigant's own rights and interests,

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[10] *Blakely v. Lancaster County, supra* note 6; *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[11] See *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

[12] *Field Club v. Zoning Bd. of Appeals of Omaha*, 283 Neb. 847, 814 N.W.2d 102 (2012).

[13] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

and cannot rest a claim on the legal rights or interests of third parties.[14] A party invoking a court's or tribunal's jurisdiction bears the burden of establishing the elements of standing.[15] At the pleading stage, the standard for determining the sufficiency of a complaint to allege standing is fairly liberal.[16]

[16] As a general rule, one who is neither a party to a contract nor an agent of a party to a contract has no rights under the contract, and cannot bring an action for breach thereof.[17] Here, Applied admits that as a nonparty to the RPA, it lacks standing to bring the claim in count II based on breach of the RPA. ARS, however, argues it has standing to bring the claim for breach of the RPA even though it is not a party thereto, because it is acting as AUCRAC's billing agent.

The complaint alleged the RPA appointed ARS the billing agent for AUCRAC and authorized ARS "to account for, offset and true up any and all amounts due . . . and owing" under the RPA. ARS argues this language in the RPA identifying ARS as "the billing agent" for AUCRAC creates an agency relationship that allows ARS to sue S.E.B. for breach of the RPA. ARS analogizes this case to *Deutsche Bank Nat. Trust Co. v. Siegel*.[18]

In *Deutsche Bank Nat. Trust Co.*, a loan servicer filed a complaint on behalf of the holder of a deed of trust, seeking judicial foreclosure of real property. The property owners claimed the court lacked subject matter jurisdiction because the loan servicer was not the real party in interest. We held that the loan servicer had standing as the trust holder's agent for two reasons. First, a contract between the trust holder and the loan servicer authorized the loan servicer "'to institute

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[14] *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

[15] *Field Club v. Zoning Bd. of Appeals of Omaha, supra* note 12.

[16] *Id.*

[17] See *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996).

[18] *Deutsche Bank Nat. Trust Co. v. Siegel*, 279 Neb. 174, 777 N.W.2d 259 (2010).

foreclosure proceedings . . . on behalf of the Trustee.'"[19] Second, the contract expressly granted a power of attorney to the loan servicer. We found that the power of attorney authorized the loan servicer to act as the trust holder's agent and that the loan servicer acted within the scope of its agency in bringing the foreclosure action. As such, the loan servicer had authority and, implicitly, standing to bring the action on behalf of the trust holder.

The instant case is factually distinguishable from *Deutsche Bank Nat. Trust Co.* Here, ARS is not seeking to enforce the RPA on behalf of AUCRAC pursuant to a power of attorney or any express authorization to institute legal action. Rather, it purports to enforce the RPA as the appointed billing agent for AUCRAC.

The signed RPA was attached to the complaint. We see nothing in the RPA, and ARS directs us to nothing other than its status as the billing agent, which indicates AUCRAC has authorized ARS to bring a legal action for breach of the RPA. To the contrary, the RPA expressly provides that in the event S.E.B. is in default of any obligations under the RPA, "[AUCRAC] may take all reasonable steps to protect its and its affiliates' interests." Referring expressly to bringing legal actions for breach, the RPA provides:

> [I]t is understood and agreed that in the event of any such breach or threatened breach of this Agreement, [AUCRAC] may apply to any federal or state court located in Omaha, Douglas County, Nebraska for, and shall be entitled to, injunctive relief from such court, without the requirement of posting a bond or proof of damages, designed to cure existing breaches and to prevent a future occurrence or threatened future occurrence of like breaches on the part of [S.E.B.]

Furthermore, the RPA expressly disavows any suggestion that any entity other than AUCRAC or S.E.B. has the implied authority to bring an action to enforce the RPA:

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[19] *Id.* at 178, 777 N.W.2d at 263.

> This Agreement is for the sole benefit of the Parties [defined elsewhere in the agreement as AUCRAC and S.E.B.] and nothing in this Agreement, express or implied, is intended to confer upon any Party, other than the Parties hereto and their affiliates, successors and permitted assigns, any legal or equitable rights, remedies, obligations or liabilities under or by reason of this Agreement, except as expressly provided herein.

Under the facts of this case, even interpreting the pleadings liberally, ARS has neither alleged nor shown an agency relationship between AUCRAC and itself sufficient to give ARS standing to bring an action for breach of the RPA.

[17] The defect of standing is a defect of subject matter jurisdiction.[20] And when questions relating to both subject matter jurisdiction and personal jurisdiction are present in a case, the court must first determine the question of subject matter jurisdiction.[21]

The district court dismissed the action for lack of personal jurisdiction, but we conclude that neither Applied nor ARS has standing to bring the claim alleged in count II, and we therefore affirm the dismissal on that basis.

## CONCLUSION

For the foregoing reasons, the dismissal of this action is affirmed, but on grounds different from those articulated by the district court.

Affirmed.

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[20] *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007).

[21] See *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# City of Lincoln, Nebraska, a political subdivision, appellant, v. County of Lancaster, a political subdivision, appellee.

898 N.W.2d 374

Filed July 21, 2017. No. S-16-852.

1. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
2. **Insurance: Contracts.** The interpretation and meaning of an insurance policy is a question of law.
3. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act allows a limited waiver of a political subdivision's sovereign immunity with respect to certain, but not all, types of tort actions.
5. ____: ____: ____. Claims against a political subdivision that are exempt from the waiver of sovereign immunity are set forth in Neb. Rev. Stat. § 13-910 (Reissue 2012).
6. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
7. **Political Subdivisions Tort Claims Act: Legislature: Immunity: Insurance: Waiver.** Through enactment of Neb. Rev. Stat. § 13-916 (Reissue 2012), the Legislature allowed a political subdivision to waive immunity to some extent by purchasing liability insurance.

8. **Insurance: Contracts.** In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.
9. **Negligence: Intent.** Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen, and unintended.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County: Jodi Nelson, Judge. Affirmed.

Jeffery R. Kirkpatrick, Lincoln City Attorney, and Elizabeth D. Elliott for appellant.

Joe Kelly, Lancaster County Attorney, and Douglas D. Cyr for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Cassel, J.

## INTRODUCTION

Where a county obtains liability insurance, it waives sovereign immunity from claims covered by the insurance to the extent stated in the policy.[1] The district court granted summary judgment for a county based upon its policy's retained insurance limit. But because the county's policy did not cover the underlying event, there was no waiver of immunity regardless of the retained insurance limit. Albeit for a different reason, we affirm the district court's summary judgment.

## BACKGROUND

In this suit, the City of Lincoln (the City) sued the County of Lancaster (the County). A deputy sheriff with the County

[1] See Neb. Rev. Stat. § 13-916 (Reissue 2012).

"made physical contact" with a police officer employed by the City, who the deputy considered a friend. There is no dispute that the deputy intended the contact. The contact to the officer's shoulder was variously described, ranging from "lighter than a pat" "with an open palm" to a "closed fist punch." Unbeknownst to the deputy, the police officer had recently undergone surgery on the shoulder. The contact injured the officer's shoulder, and the City paid slightly more than $63,000 in workers' compensation expenses for those injuries.

At the time of the incident, the County had a retained limits insurance policy which included coverage for general liability. Under the general liability coverage part, for each occurrence the retained limit was $250,000 and the limits of insurance was $4,750,000. The policy provided that the retained limit was to be borne by the County as an uninsured amount.

The City sued the County for reimbursement of expenses paid on its employee's behalf. The County set forth a number of affirmative defenses, including that it was immune from suit and that it had not waived such immunity. It also affirmatively alleged that the Political Subdivisions Tort Claims Act (the Act)[2] did not apply because the claim arose out of a battery.

The City moved for partial summary judgment, alleging that the County's purchase of liability insurance effectively waived the County's immunity under § 13-916. The County subsequently moved for summary judgment in its favor.

The district court sustained the County's motion for summary judgment. First, the court determined that the City's negligence claim arose from a battery and was barred by the intentional torts exception under the Act. Second, the court decided that the County's procurement of insurance did not constitute a waiver of its sovereign immunity for the claim. The court observed that under the terms of the insurance policy, the insurer was obligated to pay only damages and claims

[2] See Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012).

expenses in excess of the retained limit. The court concluded that the County's procurement of insurance did not constitute a waiver for claims less than $250,000. It reasoned that because the amount in controversy was $63,418.22, the County did not waive its sovereign immunity by obtaining insurance for claims exceeding $250,000.

The City filed a timely appeal, and we moved the case to our docket.[3] We subsequently ordered supplemental briefing, which we have considered in resolving this appeal.

## ASSIGNMENTS OF ERROR

The City assigns that the district court erred (1) by finding that there were no genuine issues of material fact and (2) by finding that the County was immune and did not waive its immunity when it purchased liability insurance.

## STANDARD OF REVIEW

[1,2] Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.[4] The interpretation and meaning of an insurance policy is a question of law.[5]

[3] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6]

## ANALYSIS

[4,5] The district court found that the City's claim arose from a battery and was barred by the Act's intentional torts

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[4] *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015).

[5] See *Drake-Williams Steel v. Continental Cas. Co.*, 294 Neb. 386, 883 N.W.2d 60 (2016).

[6] *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011).

exception. The Act allows a limited waiver of a political subdivision's sovereign immunity with respect to certain, but not all, types of tort actions.[7] Claims against a political subdivision that are exempt from the waiver of sovereign immunity are set forth in § 13-910.[8] One of those exemptions, the "intentional torts exception," provides that the Act shall not apply to "[a]ny claim arising out of . . . battery . . . ."[9]

[6] The City's opening brief did not specifically assign or argue that the court erred in finding that the City's claim arose from a battery. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[10] As we have already summarized, widely varying terms were used to describe the touching—but they all described an intentional act. The City's opening brief did not challenge this characterization.

But in the City's supplemental brief, it now attempts to make an argument challenging the court's characterization of the touching as a battery. Making such an argument for the first time in a supplemental brief, as in a reply brief,[11] is improper. Viewing the evidence in the light most favorable to the City and giving it the benefit of all favorable inferences, we see no plain error in the court's finding. Because the claim arose out of a battery, the County is immune from the City's suit, unless it has otherwise waived its immunity.

[7] The City contends that the County waived its immunity by procuring liability insurance. Through enactment of § 13-916, the Legislature allowed a political subdivision to waive immunity to some extent by purchasing liability insurance. The statute provides:

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[7] See *id.*

[8] See *Blaser v. County of Madison*, 288 Neb. 306, 847 N.W.2d 293 (2014).

[9] § 13-910(7).

[10] *State of Florida v. Countrywide Truck Ins. Agency*, 294 Neb. 400, 883 N.W.2d 69 (2016).

[11] See *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014).

> The governing body of any political subdivision . . . may purchase a policy of liability insurance insuring against all or any part of the liability which might be incurred under the . . . Act and also may purchase insurance covering those claims specifically excepted from the coverage of the act by section 13-910. . . . *The procurement of insurance shall constitute a waiver of the defense of governmental immunity as to those exceptions listed in section 13-910 to the extent and only to the extent stated in such policy*. . . . Whenever a claim or suit against a political subdivision is covered by liability insurance or by group self-insurance provided by a risk management pool, the provisions of the insurance policy on defense and settlement or the provisions of the agreement forming the risk management pool and related documents providing for defense and settlement of claims covered under such group self-insurance shall be applicable notwithstanding any inconsistent provisions of the act.[12]

Under our statute, the terms of the liability policy determine whether immunity is waived. The policy here does not explicitly state that it constitutes a waiver of immunity as to any claim.

The parties have framed the issue as whether immunity is waived where the claim falls within the political subdivision's retained limit or self-insured retention. But we need not reach that issue if the claim does not fall within the policy's insuring agreement.

[8] In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.[13] A claim must fall within the policy's coverage, and an exclusion must

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[12] § 13-916 (emphasis supplied).

[13] *Drake-Williams Steel v. Continental Cas. Co., supra* note 5.

not be applicable.[14] Before considering the effect of a retained limit or self-insured retention, we examine the terms of the policy to determine whether it provided coverage for a claim arising out of a battery.

The "Insuring Agreement" specifies under what circumstances the insurer is obligated to pay. The provision for the general liability coverage part states:

> The **Insurer** will indemnify the **Insured** for **Damages** and **Claim Expenses** in excess of the **Retained Limit** for which the **Insured** becomes legally obligated to pay because of a **Claim** first arising out of an **Occurrence** happening during the **Policy Period** in the Coverage Territory for **Bodily Injury**, **Personal Injury**, **Advertising Injury**, or **Property Damage** taking place during the **Policy Period**.

The insuring agreement requires that the claim arise out of an "occurrence." The policy defines an "occurrence" with respect to "bodily injury" as "an accidental happening" which results in "bodily injury." Although the policy does not define "accidental happening," an "accident" is defined as "an unintended and unexpected harmful event."

[9] Under the terms of the policy, the insuring agreement does not provide coverage for bodily injury resulting from an intentional act. Here, the claim arose out of a battery. "A harmful contact intentionally done is the essence of battery."[15] Because the contact is intentional, a battery cannot be an accidental happening. We have previously stated that "intentional acts by definition cannot be accidents."[16] And we have explained that "where acts are voluntary and intentional and the injury is the natural result of the act, the result was not

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[14] See *id.*

[15] *Britton v. City of Crawford, supra* note 6, 282 Neb. at 382, 803 N.W.2d at 515.

[16] See *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 702, 625 N.W.2d 213, 217 (2001).

caused by accident even though that result may have been unexpected, unforeseen, and unintended."[17] As a matter of law, there was no "occurrence." And the parties agree in their supplemental briefs that a claim for battery does not fall within the insuring agreement. Because there was no coverage for the battery, the County did not waive its immunity for that claim.

For the sake of completeness, we note that the policy coverage for "personal injury" does not cover a claim arising out of a battery. The definition of "personal injury" states that it "means one or more of the following offenses" followed by a list of offenses. The enumerated offenses include a number of torts listed in the intentional torts exception of § 13-910(7), but battery is not one of them. Battery therefore does not fall within the definition of "personal injury."

[10] The City recognizes in its supplemental brief that if the claim arose from a battery, it is unnecessary for us to determine whether immunity is waived where a claim falls within the retained limit. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the case and controversy before it.[18] But the City nonetheless asks us to decide the question in the interest of judicial efficiency. Because the determination as to whether there is a waiver of immunity may depend on the language of a particular insurance policy, we decline to make some sort of blanket pronouncement.

We are not necessarily persuaded that the Legislature envisioned one political subdivision using the Act to sue another

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[17] *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 206, 570 N.W.2d 320, 325 (1997). Cf. *Sullivan v. Great Plains Ins. Co.*, 210 Neb. 846, 854, 317 N.W.2d 375, 380 (1982) (stating that damage to vehicle, even though result of driver's own careless behavior, was still "an accident" within meaning of insurance policy).

[18] See *Anderson v. Union Pacific RR. Co.*, 295 Neb. 785, 890 N.W.2d 791 (2017).

subdivision. But we cannot find any provision of law that would prevent a political subdivision from doing so.

## CONCLUSION

Because the claim arose out of a battery and a battery is not an "occurrence" under the terms of the insurance policy, there was no possibility of any coverage for the claim under the policy. For reasons different from those stated by the district court, we conclude that the County's procurement of insurance did not constitute a waiver of immunity as to a claim arising out of a battery. We affirm the court's judgment.

Affirmed.

Stacy, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Latriesha L. Rogers, appellant.

899 N.W.2d 626

Filed July 21, 2017. No. S-16-1114.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
3. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
4. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
5. **Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.
6. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Arrests.** The Nebraska Supreme Court has described three tiers of police-citizen encounters. A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection. A tier-two

police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning. A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention. Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.

7. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
8. **Police Officers and Sheriffs: Search and Seizure.** In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.
9. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** An officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement.
10. ____: ____: ____. An officer's request that an individual step out of a parked vehicle does not automatically transform a tier-one police-citizen encounter into a tier-two encounter. But, if the totality of the circumstances are such that a reasonable person would believe he or she was not free to ignore the request and stay in the vehicle, a seizure has occurred for Fourth Amendment purposes.
11. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
12. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.
13. **Sentences: Appeal and Error.** In reviewing a sentence imposed within the statutory limits, an appellate court considers whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any legal principles in determining the sentence to be imposed.
14. **Sentences.** When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience,

(4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.

15. ____. Because the appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life, a sentencing court is accorded very wide discretion in imposing a sentence.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Christopher Eickholt for appellant.

Douglas J. Peterson, Attorney General, and Joe Meyer for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

## I. INTRODUCTION

In this direct appeal, Latriesha L. Rogers challenges the denial of her motion to suppress evidence seized during the detention and search of a vehicle in which she was a passenger. The critical issue is when the encounter reached the second-tier and what reasonable suspicion existed at that point. Rogers also alleges that she received an excessive sentence. Finding no merit in her arguments, we affirm.

## II. BACKGROUND

### 1. Police-Citizen Encounter

On August 5, 2015, a Lincoln police officer located a vehicle associated with an individual wanted on a federal indictment. The vehicle was parked on a residential street and had two occupants. A second vehicle was parked in front of the target vehicle with the engine running and three occupants. The officer parked her patrol vehicle in the middle of the

street and approached the second vehicle on foot to ensure the wanted individual was not inside and about to leave.

On approaching the vehicle, the officer noticed the front seat passenger reach under his seat and directed him to stop in case he had a weapon. The officer then spoke to the driver and explained that she was looking for a wanted individual. Within 20 to 30 seconds, three officers from the Lincoln Police Department and the Metro Area Fugitive Task Force arrived to assist the lead officer in identifying the occupants of the vehicle.

After a minute had passed, the officer realized that the wanted individual was not in the vehicle. However, she continued to attempt to identify the occupants of the vehicle, because she recognized the driver as a contact for several narcotics investigations and believed he was involved with the selling of narcotics. She also suspected the front seat passenger had hidden a weapon or contraband under the front seat while she walked up to the vehicle. She did not recognize that passenger or the one in the back seat, but the back seat passenger was later identified as Rogers.

While identifying the occupants of the vehicle, the officers had the three individuals exit the vehicle and the front seat passenger was arrested after determining there was a warrant for his arrest. After Rogers exited the vehicle, the lead officer looked through the windows and noticed a purse with a small plastic bag sticking out of it on the floor in the back seat. The officer recognized the bag as consistent with those used in narcotics sales and asked for consent to search the vehicle, but her request was denied. At this point, the officers called for a drug detection dog to conduct a sniff search around the vehicle.

The drug detection dog alerted on the driver's side of the vehicle, and the officers then conducted a search of the vehicle and its contents—including the purse on the floor of the back seat. The search of the purse yielded a pipe and the observed plastic bag which contained some residue. The pipe pretested

positive for amphetamines. After the pipe and purse were confirmed to belong to Rogers, she was arrested and charged with possession of a controlled substance.

### 2. Motion to Suppress

Rogers filed a motion to suppress evidence concerning the stop and search of the vehicle and the evidence seized as a result of the search. Following a hearing, the district court overruled the motion. The court concluded that the encounter was initially a first-tier encounter that escalated to a second-tier and eventually a third-tier encounter. And, it found that there was reasonable suspicion of illegal activity to justify the second-tier investigation based on the lead officer's past encounters with the driver of the vehicle, "the furtive movements of the front seat passenger, and the observation of the baggie in the purse in the rear passenger floor board."

The case proceeded to trial, where Rogers preserved her objection raised in the motion to suppress. After all the evidence was presented, the jury found Rogers guilty of the crime charged. The district court sentenced her to 20 months' to 5 years' imprisonment.

Rogers appealed, and we moved the case to our docket.[1]

## III. ASSIGNMENTS OF ERROR

Rogers assigns, restated, that the district court erred in (1) overruling her motion to suppress the stop and search of a vehicle in which she was a passenger and the subsequent search and seizure of its contents and (2) imposing an excessive sentence.

## IV. STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[2]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[2] *State v. Milos*, 294 Neb. 375, 882 N.W.2d 696 (2016).

Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[3] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[4]

[3] We will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[5]

## V. ANALYSIS

### 1. Seizure

Rogers alleges that the district court erred when it overruled her motion to suppress evidence obtained as a result of her encounter with law enforcement officials on August 5, 2015. She argues that the initial encounter with the lead law enforcement officer amounted to a seizure when she was detained after the officer determined the wanted individual was not in the vehicle. And, she argues that the investigatory stop was not supported by reasonable suspicion.

[4,5] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[6] Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.[7]

To analyze the legality of the search and seizure, we must first determine when the seizure occurred and then address whether the seizure was supported by reasonable suspicion.

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[3] *Id.*

[4] *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015).

[5] *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017).

[6] *State v. Milos, supra* note 2.

[7] *Id.*

### (a) Classification of Police-Citizen Encounter

[6] We have described three tiers of police-citizen encounters.[8] A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen.[9] Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection.[10] A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning.[11] A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention.[12] Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[13]

[7-9] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[14] In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.[15] But an officer's merely questioning an individual in a public place,

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[8] See *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[9] *State v. Milos, supra* note 2.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement.[16]

Without repeating all the facts recited above, it is clear that the police-citizen encounter began as a tier-one encounter and escalated to a tier-two encounter when Rogers and the other two passengers were directed to exit the vehicle. The district court did not account for the passengers exiting or being asked to exit the vehicle when it made its determination on the motion to suppress. Thus, on this point, we are not constrained by a specific finding of historical fact.

[10] An officer's request that an individual step out of a parked vehicle does not automatically transform a tier-one police-citizen encounter into a tier-two encounter.[17] But, if the totality of the circumstances are such that a reasonable person would believe he or she was not free to ignore the request and stay in the vehicle, a seizure has occurred for Fourth Amendment purposes.[18] The circumstances of the encounter demonstrate that the law enforcement officials made a significant show of authority before asking Rogers to exit the vehicle. The passengers were outnumbered and surrounded by law enforcement officials. And, Rogers was asked to exit the vehicle *after* one of the other passengers was arrested. These

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[16] *Id.*

[17] *Id.*

[18] See *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009). See, also, *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998); *Sharp v. U.S.*, 132 A.3d 161 (D.C. 2016); *Popple v. State*, 626 So. 2d 185 (Fla. 1993); *People v Freeman*, 413 Mich. 492, 320 N.W.2d 878 (1982); *State in Interest of A.P.*, 315 N.J. Super. 166, 716 A.2d 1211 (1998); *People v Harrison*, 57 N.Y.2d 470, 443 N.E.2d 447, 457 N.Y.S.2d 199 (1982); *Johnson v. State*, 658 S.W.2d 623 (Tex. Crim. App. 1983), *overruled on other grounds, Woods v. State*, 956 S.W.2d 33 (Tex. Crim. App. 1997).

circumstances surrounding the request to exit the vehicle would have made a reasonable person believe that he or she was not free to stay in the vehicle. Consequently, for the request to exit the vehicle to be a lawful seizure, the officer needed to have reasonable suspicion of criminal activity.

(b) Reasonable Suspicion

Rogers alleges that the lead officer had no reasonable suspicion of illegal activity to justify the detention of the passengers of the vehicle after the lead officer determined the wanted individual was not in the vehicle. She argues that the detention was only supported by a "'hunch'" that the driver may be involved in illegal activity because he lived with individuals who were being investigated for the sale of narcotics.[19]

[11,12] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.[20] Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.[21]

In this case, the lead officer witnessed the front seat passenger reach underneath his seat, which suggested to her that he was possibly retrieving or hiding contraband or weapons.[22] The officer also recognized the driver as a known contact for narcotics, and the assisting officers provided narcotics intelligence regarding the front seat passenger. These facts combined with the close proximity of the vehicle to the target vehicle associated with a wanted individual were sufficient to

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[19] Brief for appellant at 17.

[20] *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

[21] *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

[22] See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006) (determining that observing passenger reach under seat to stow something contributed to reasonable suspicion).

give rise to a reasonable suspicion that the occupants of the vehicle were involved in illegal drug activity.

After the lead officer observed the small plastic bag, similar to those used in narcotics sales, inside Rogers' purse, the officers had reasonable suspicion to further detain Rogers and the other passengers of the vehicle for a drug detection dog sniff. It is undisputed that the drug detection dog sniff was initiated and concluded within a reasonable time and that the officers had probable cause to search the vehicle after the dog alerted to the presence of drugs. Therefore, the district court did not err in overruling Rogers' motion to suppress.

### 2. Sentence

Rogers alleges that she received an excessive sentence, because the district court "failed to meaningfully consider the circumstances surrounding the offense, the nature of the offense, the age, mentality and history of [Rogers] and the circumstances relating to [Rogers'] life."[23] She argues that the district court made no specific factual findings to justify the sentence and should have explained the maximum sentence that "should be saved for the 'worst of the worst' offenders."[24] Because Rogers was convicted of a Class IV felony committed before August 30, 2015, she was subject to a sentence of up to 5 years' imprisonment, a $10,000 fine, or both.[25] Thus, her sentence of 20 months' to 5 years' imprisonment was within the statutory limits.

[13,14] In reviewing a sentence imposed within the statutory limits, an appellate court considers whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any legal principles in determining the sentence to be imposed.[26] When imposing a sentence, the

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[23] Brief for appellant at 21.

[24] *Id*. at 23.

[25] Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014). See, also, § 28-105(8) (Reissue 2016) and Neb. Rev. Stat. § 28-116 (Reissue 2016).

[26] *State v. Loding, supra* note 5.

sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.[27]

[15] There is no evidence that the district court failed to consider the appropriate factors in sentencing Rogers. And, the court was not required to make specific factual findings to justify the sentence imposed. Because the appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life, a sentencing court is accorded very wide discretion in imposing a sentence.[28] Accordingly, we conclude that the court did not abuse its discretion in imposing Rogers' sentence.

## VI. CONCLUSION

We conclude that the officers' seizure of Rogers was supported by reasonable suspicion and that the district court did not err in overruling Rogers' motion to suppress. Because we also conclude that the sentence imposed did not constitute an abuse of discretion, we affirm the judgment of the district court.

Affirmed.

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[27] *Id.*

[28] See, *State v. Draper*, 295 Neb. 88, 886 N.W.2d 266 (2016); *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Paul J. Jedlicka, appellant.

900 N.W.2d 454

Filed July 28, 2017. No. S-16-629.

1. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
2. **Rules of Evidence: Hearsay.** Whether a statement was both taken and given in contemplation of medical diagnosis or treatment is a factual finding made by the trial court in determining the admissibility of the evidence under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016).
3. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** An ineffective assistance of counsel claim is raised on direct appeal when allegations of deficient performance are made with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.
4. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
5. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?

6. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
7. **Rules of Evidence: Hearsay.** A declarant's out-of-court statement offered for the truth of the matter asserted is inadmissible unless it falls within a definitional exclusion or statutory exception.
8. ____: ____. Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016), is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment.
9. **Rules of Evidence: Hearsay: Sexual Assault: Minors.** Statements made by a child victim of sexual abuse to a forensic interviewer in the chain of medical care may be admissible under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016), even though the interview has the partial purpose of assisting law enforcement's investigation of the crimes.
10. **Rules of Evidence: Hearsay: Police Officers and Sheriffs.** The fundamental inquiry to determine whether statements, made by a declarant who knew law enforcement was listening, had a medical purpose is if the challenged statement has some value in diagnosis or treatment, because the patient would still have the requisite motive for providing the type of sincere and reliable information that is important to that diagnosis and treatment.
11. **Rules of Evidence: Hearsay: Proof.** Statements having a dual medical and investigatory purpose are admissible under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016), only if the proponent of the statements demonstrates that (1) the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.
12. **Rules of Evidence: Hearsay.** Under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016),the admissibility of a victim's statements in a recording is not distinct from the admissibility of the statements themselves.
13. **Rules of Evidence: Hearsay: Intent.** Under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016), the fundamental inquiry when considering a declarant's intent is whether the statement was made in legitimate and reasonable contemplation of medical diagnosis or treatment.
14. ____: ____: ____. Under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016), the appropriate state of mind of the declarant may be reasonably inferred from the circumstances; such a determination is necessarily fact specific.

15. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
16. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
17. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
18. ____: ____. To show prejudice on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
19. **Effectiveness of Counsel: Proof: Presumptions.** The two prongs of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.
20. ____: ____: ____. *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), provides narrow exceptions to the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), where the reliability of the adversarial process is in such doubt that prejudice to the defendant will be presumed, resulting in a conclusion of ineffective assistance of counsel.
21. **Effectiveness of Counsel: Presumptions.** Under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), there are three circumstances where prejudice to the defendant will be presumed: (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify the presumption of ineffectiveness without inquiry into counsel's actual performance at trial.
22. **Effectiveness of Counsel.** The difference between the rule in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and the rule in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039,

80 L. Ed. 2d 657 (1984), is the difference between bad lawyering and no lawyering.

23. ____. Under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), for counsel to entirely fail to subject the prosecution's case to meaningful adversarial testing, the attorney's failure must be complete.

24. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

25. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Ann C. Addison-Wageman, of Law Office of Ann C. Addison-Wageman, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

In this direct appeal, Paul J. Jedlicka challenges his conviction, by jury verdict, for first degree sexual assault of a child under 12 years of age. Jedlicka primarily argues that he was prejudiced by the erroneous admission of hearsay evidence under the medical diagnosis and treatment exception, Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016).

We conclude that the court properly admitted such evidence under rule 803(3). We also reject Jedlicka's assertions that his trial counsel provided ineffective assistance and that the evidence was insufficient to support his conviction. Therefore, we affirm.

## II. FACTS

In May 2015, Jedlicka was in a relationship with the mother of the 10-year-old victim, M.B., and had been living with M.B., her mother, and her younger brother since the fall of 20l4. On May 13, 2015, the mother was working the night shift as an emergency room nurse while Jedlicka watched M.B. and her brother. After playing a "scary" video game, M.B.'s brother wanted to sleep with her, but Jedlicka suggested both children sleep with him in his and their mother's bedroom. M.B. slept between Jedlicka and her brother.

M.B. testified that she woke up during the night to Jedlicka's fingers inside her vagina. She said that she was scared and confused but pretended to be asleep because she did not know what else to do; M.B. did not want Jedlicka to know that she knew what was happening so that she could tell someone later. She testified that she knew it was Jedlicka, because his hand was bigger than her brother's and she saw that her brother was asleep on his back when she briefly opened her eyes. M.B. said that eventually Jedlicka stopped and left the room.

The next morning, M.B. got ready for school and went to the bus stop with her brother. She said that she did not say anything that morning, because Jedlicka was the only adult at the house and she still did not want him to know she had been awake. M.B.'s mother met the children at the bus stop a minute or two before the bus arrived to make sure they got there on time. She said that her son was acting normal, but that M.B. was acting differently, clinging to her rather than playing with the other children. M.B. said that she did not tell her mother, because other people were around.

Once M.B. got to school, she told her teacher from the prior year about the incident. The teacher testified at trial that M.B. told her that Jedlicka had touched her privates. As a result, the teacher notified the school psychologist and made a report to Child Protective Services.

Det. Brandon Stigge reported to the school to investigate the allegation. He testified that M.B. was crying when he arrived and that he told her there were "way smarter" people than he was that would like to talk to her. Stigge called the mother and requested that she come to the school. While waiting for the mother to arrive, he contacted Project Harmony to request a forensic interview.

After the mother arrived at the school, Stigge told her M.B.'s allegation and explained to her the process that would take place. Stigge recommended that the mother take M.B. to Project Harmony. The mother testified that she took M.B. to Project Harmony voluntarily.

Project Harmony is a child advocacy center that serves children when there have been allegations of abuse. It provides forensic interview, medical, and mental health services and victim advocacy. Children typically become involved with Project Harmony by referral from law enforcement or Child Protective Services during an active investigation. Law enforcement and Child Protective Services representatives can watch the interviews by closed-circuit television and are provided a DVD of the video-recorded interviews.

April Anderson is a forensic interviewer at Project Harmony. She has a master's degree in social work and is a licensed mental health practitioner. Anderson has completed numerous training courses for forensic interviewing since she began working at Project Harmony in 2001, including training through the National Children's Advocacy Center (NCAC). She testified that she has conducted over 5,000 forensic interviews, close to 60 percent of which were in child sexual assault cases. Anderson stated that as a forensic interviewer, she conducts structured conversations with children to gather

information to piece together whether something did or did not happen.

Anderson testified that she provides the information she learns in her interviews to the nurse practitioner at Project Harmony, Sarah Cleaver, to assist Cleaver in making an appropriate medical diagnosis and in determining any appropriate medical care or mental health treatment the child may need. The information also assists in identifying the perpetrator to ensure the child is not being placed back in the home with the abuser.

Anderson testified that she met with M.B.'s mother before the interview to gather some background information and explain what was going to take place. Anderson then interviewed M.B. while Stigge and a caseworker observed the interview in an adjacent room by closed-circuit television.

The DVD of Anderson's interview with M.B. shows that Anderson began the interview by explaining that M.B. was safe and that nobody was going to hurt her. She also told M.B. that "two friends" were watching from another room to make sure Anderson did not forget to ask anything important. Then, Anderson explained the importance of telling the truth and M.B. agreed that she would tell the truth.

Anderson proceeded to ask M.B. open-ended questions about the abuse, under NCAC protocols. M.B.'s responses were initially vague, but she eventually described the sexual assault in detail. M.B. stated that she had slept with Jedlicka that night and woke up while it was still dark to Jedlicka's fingers inside her vagina.

After M.B. described the sexual assault, Anderson left the room to consult with Stigge. She testified that Stigge asked her to inquire further about the sleeping arrangement and how M.B. knew it was Jedlicka touching her, but she said that Stigge did not tell her any questions to ask.

Anderson stated that the information she learned from M.B. was important for her to determine the appropriate followup care and treatment for the child. Before examining M.B.,

Cleaver, who was not present to observe the interview, spoke with Anderson to gather information about M.B. Cleaver testified that it was important that she receive an accurate account of the assault, because "[i]t helps guide me during the exam as to where I should look, what kind of injuries I would potentially consider, [and] where I would potentially collect evidence from." She also stated that the information from Anderson assisted her in examining M.B., because she knew to obtain a DNA sample since the assault had occurred within 72 hours.

Cleaver began M.B.'s examination by asking her what had happened. Specifically, Cleaver inquired about (1) the time of the assault; (2) where M.B. was assaulted; (3) what M.B. may have done since the assault that would have interfered with DNA collection, including showering, urinating, and changing clothing; and (4) if M.B. had experienced pain during the assault.

Cleaver said the examination could neither confirm nor disprove a sexual assault occurred. She said that based on her training and experience, she would not expect to see any signs of injury based on M.B.'s report of digital penetration. Cleaver did not test for sexually transmitted diseases, because it was not a concern from digital penetration. After Cleaver's examination was complete, M.B. saw a therapist at Project Harmony.

At trial, Jedlicka objected to the admission of exhibit 2, the Project Harmony video recording of Anderson's interview of M.B., into evidence because it was hearsay. The court overruled Jedlicka's objection, finding that exhibit 2 qualified for the medical exception to hearsay. After the prosecution had concluded its case in chief, Jedlicka moved to dismiss by arguing that no reasonable juror could find that penetration occurred. The court overruled the motion.

The jury found Jedlicka guilty of first degree sexual assault of a child under 12 years of age. For the sentencing hearing, Jedlicka obtained substitute counsel from his trial. Jedlicka

was sentenced to a term of incarceration of 15 to 25 years. Jedlicka, with substitute counsel, appeals the conviction.

## III. ASSIGNMENTS OF ERROR

Jedlicka assigns, restated, the following errors: (1) The court erred by admitting hearsay evidence under the medical diagnosis and treatment exception, rule 803(3); (2) his trial counsel was ineffective; and (3) the court erred by overruling his motion to dismiss at the close of the State's case, because there was insufficient evidence to support his conviction.

## IV. STANDARD OF REVIEW

[1] Apart from rulings under the residual hearsay exception, we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.[1]

[2] Whether a statement was both taken and given in contemplation of medical diagnosis or treatment is a factual finding made by the trial court in determining the admissibility of the evidence under rule 803(3).[2]

[3] An ineffective assistance of counsel claim is raised on direct appeal when allegations of deficient performance are made with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.[3]

[4] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[4]

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[1] *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

[2] *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012).

[3] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[4] *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

[5] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?[5]

## V. ANALYSIS

### 1. Excessive Sentence Not Assigned as Error

[6] We first dispose of a preliminary issue. An appellate court does not consider errors which are argued but not assigned.[6] Jedlicka argues that his sentence is excessive. However, he did not assign this proposition as error. As a result, we need not consider whether Jedlicka's sentence was excessive and we restrict our analysis to Jedlicka's listed assignments of error.

### 2. Exhibit 2 Was Not Inadmissible Hearsay Under Rule 803(3)

Jedlicka argues that exhibit 2 was hearsay not within the rule 803(3) exception, because it was not made in the chain of medical care and the State failed to demonstrate that M.B. made the statements therein with the intent to obtain medical diagnosis or treatment. He also contends that exhibit 2 was made only for investigatory purposes.

[7] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.[7] A declarant's out-of-court statement offered for the truth of the matter asserted is

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[5] *Ash, supra* note 3.

[6] *State v. McCumber*, 295 Neb. 941, 893 N.W.2d 411 (2017).

[7] Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2016).

inadmissible unless it falls within a definitional exclusion or statutory exception.[8]

[8] Rule 803(3) provides that the hearsay rule does not exclude "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Rule 803(3) is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment.[9] In order for statements to be admissible under rule 803(3), the party seeking to introduce the evidence must demonstrate (1) that the circumstances under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.[10]

[9-11] In *State v. Vigil*,[11] we held that "statements made by a child victim of sexual abuse to a forensic interviewer in [the chain of medical care] may be admissible under rule 803(3) even though the interview has the partial purpose of assisting law enforcement's investigation of the crimes." We stated that the fundamental inquiry to determine whether statements, made by a declarant who knew law enforcement was listening, had a medical purpose is "'[i]f the challenged statement has some value in diagnosis or treatment, [because] the patient would still have the requisite motive for providing the type of "sincere and reliable" information that is important

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[8] See, Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2016); *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[9] *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014).

[10] *Id.*

[11] *Vigil, supra* note 2, 283 Neb. at 139, 810 N.W.2d at 696.

to that diagnosis and treatment.'"[12] Nevertheless, the admissibility of dual purpose statements are still subject to the general two-prong standard used to determine admissibility under rule 803(3).[13]

Jedlicka did not assert that M.B.'s statements were not reasonably pertinent or lacked value for medical diagnosis or treatment. Therefore, we consider only whether Anderson's interview was in the chain of medical care and whether M.B. made the statements therein with the intent to obtain medical diagnosis or treatment.

(a) Anderson's Interview Was Conducted in Chain of Medical Care

Jedlicka asserts that exhibit 2 was not in the chain of medical care, primarily, because Cleaver did not watch it before examining M.B. Further, he contends that M.B.'s statements to Anderson were not in the chain of medical care, because Cleaver asked M.B. some of the same questions later. Specifically, Jedlicka argues that M.B.'s statements to Anderson could be in the chain of medical care only if they prevented her from being revictimized by having to recount the assault again later.

Although the heart of the rule 803(3) exception lies in statements made by a patient to a treating physician, the exception casts its net wider than the patient-physician relationship.[14] Accordingly, the admissibility of statements, under rule 803(3), is not dependent on whether they were made to a physician.[15] As mentioned above, we held in *Vigil* that statements made to a forensic interviewer may qualify for the rule 803(3) exception, if they are a part of the "'chain of medical care.'"[16]

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[12] *Id.* at 137, 810 N.W.2d at 695-96.

[13] See *id.*

[14] *Id.*

[15] *Herrera*, *supra* note 9.

[16] *Vigil*, *supra* note 2, 283 Neb. at 137, 810 N.W.2d at 695.

In *Vigil*, Kelli Lowe, a forensic interviewer, recorded her interview with the victim, D.S. Lowe testified that her role was "'to gather the information for all, for everyone involved so that the child only has to go through it one time,'"[17] and "to determine possible abuse or traumatic injury."[18] She testified further that "the treating physician utilizes the forensic interview in determining the proper treatment and therapy for the patient."[19] Lowe stated that she verbally summarized the interview to a doctor, who then created the discharge instructions—recommending therapy and a physical examination—based solely on Lowe's summary. D.S. was not examined by a doctor until 9 days later.

At the defendant's trial, the video-recorded interview between D.S. and Lowe was entered into evidence. We did not consider the fact that the video recording was never viewed by the treating physician to be relevant in determining its admissibility. We held that the video recording was properly admitted as evidence under rule 803(3).

[12] Accordingly, under rule 803(3), the admissibility of a victim's statements in a recording is not distinct from the admissibility of the statements themselves. Therefore, we consider only whether M.B.'s statements to Anderson are admissible.

The facts concerning M.B.'s statements to Anderson are substantially the same as D.S.' statements to Lowe in *Vigil.* Anderson testified that her forensic interviews derive information that is used to guide the treatment of a victim regarding medical care, therapeutic care, and followup treatment. Cleaver testified that she did not watch the video-recorded interview, but merely received a verbal summary of it from Anderson. Similar to *Vigil*, Cleaver's determination that M.B. should receive a medical examination was based solely on Anderson's

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[17] *Id.* at 133-34, 810 N.W.2d at 693.

[18] *Id*. at 133, 810 N.W.2d at 693.

[19] *Id.*

summary. Further, Cleaver testified that Anderson's summary informed her that the need for an examination was imminent because the 72-hour window to collect DNA evidence from M.B. had not passed.

Jedlicka's argument that statements to a forensic interviewer are not in the chain of medical care if they do not prevent any requestioning of a victim that might lead to revictimization is without merit. Such an argument is not based on any holdings by this court, but, instead, on a statement made by Lowe, included in our opinion in *Vigil*, describing her role as a forensic interviewer.

In *Vigil*, we did not consider whether the doctor who later examined D.S. asked her questions that were also asked by Lowe. Further, we do not think it desirable to discourage medical professionals from discussing a child victim's assault with the child, to build rapport and to understand the child's emotional state, before engaging in the type of intimate examination required in these situations.

Here, Anderson interviewed M.B. the day that she was assaulted and was the first person to whom M.B. told specific details. Anderson emphasized the need for M.B. to tell the truth, and her NCAC training assisted M.B. to share progressively more details of the assault throughout the interview. Cleaver's testimony that it was important that she receive an accurate account of the assault to guide her examination and inform her of potential injuries emphasizes the importance of Anderson's extensive training in interviewing child sexual assault victims.

Further, Anderson's interview focused on broader issues—including the perpetrator's identity and the circumstances of the assault—than Cleaver's recount of her interview, which focused more on symptoms and evidence collection. In *Vigil*, we explained that "[t]he frequency and nature of the sexual contacts with [the defendant] were part of D.S.' medical history" and that the defendant's familial relationship with D.S. and his residence in the home with her made his identity

reasonably pertinent to diagnosis and treatment.[20] Additionally, we stated that "[d]etails of the abuse are relevant to psychological implications regardless of whether any physical injury occurred. . . . [E]valuation of the need for psychological treatment is a fundamental component of sexual assault cases and, thus, a component of medical diagnosis and treatment in such cases."[21]

Accordingly, Anderson's interview elicited facts that were reasonably pertinent to Cleaver's diagnosis and treatment of M.B., including the recommendation that M.B. follow up with a mental health therapist at the conclusion of her examination. Therefore, the court did not err in findings that Anderson was acting in the chain of medical care.

### (b) M.B.'s Statements to Anderson Were Made With Intent to Obtain Medical Diagnosis or Treatment

Jedlicka also argues that the State failed to present sufficient direct or circumstantial evidence that M.B.'s statements during the interview were made for the purpose of medical diagnosis or treatment. Specifically, he asserts that neither M.B. nor her mother testified that she had medical concerns about M.B., that she knew what Project Harmony was, or that she knew that M.B. would receive medical treatment after the interview. Additionally, Jedlicka argues that the setting of the interview was not medical in nature.

[13,14] Under rule 803(3), the fundamental inquiry when considering a declarant's intent "is whether the statement, despite its dual purpose, was made in legitimate and reasonable contemplation of medical diagnosis or treatment."[22] Under rule 803(3), there need not be direct evidence of the

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[20] *Id.* at 141, 810 N.W.2d at 698.

[21] *Id.* at 140-41, 810 N.W.2d at 697-98.

[22] *Herrera, supra* note 9, 289 Neb. at 598, 856 N.W.2d at 330, citing *Vigil, supra* note 2.

declarant's state of mind; instead, the appropriate state of mind of the declarant may be reasonably inferred from the circumstances.[23] Determining if the circumstances warrant inferring the appropriate state of mind is necessarily a fact-specific determination.[24]

In *Vigil*, we determined that D.S.' statements to Lowe were pertinent to medical diagnosis or treatment.[25] There, we considered the following facts: D.S.' mother was concerned for D.S.' physical and psychological health; D.S. believed she would be physically examined after the interview, and her mother had explained to her that certain medical procedures may be necessary; D.S. was concerned that she had gotten sick from the abuse; and D.S. was checked into the hospital, where the forensic interview took place, as a patient.

We also cited another case in *Vigil* where a court had inferred that the victim's statements in a video-recorded interview were for medical diagnosis or treatment, *State v. Donald M.*[26] There, the court relied on the following facts: The 10-year-old victim was taken to a child advocacy center in a hospital, the interviewer testified that the purpose of the interview was to assess the physical and psychological needs of the victim, and a social worker testified that she had told the victim that the interviewer was going to make sure she was safe and determine if a doctor examination would be necessary.

Here, there is no direct testimony from M.B. that she made her statements to Anderson with the intent to receive medical diagnosis or treatment. However, there is circumstantial evidence from which the court could infer that M.B. made her statements with such intent.

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[23] *Vigil, supra* note 2, citing *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

[24] See *id.*

[25] *Id.*

[26] *State v. Donald M.*, 113 Conn. App. 63, 966 A.2d 266 (2009).

First, as in *Donald M.*, M.B. testified that Anderson told her that she was there to help and make sure that nothing was wrong with her. Additionally, the video recording shows Anderson telling M.B. that she is safe and that nobody is going to hurt her and asking M.B. if she will tell the truth and talk only about things that are real and true.

Second, as in *Donald M.*, Anderson testified that one purpose of her interviews is to help figure out what needs the child may have regarding medical or therapeutic care to make a determination concerning any followup treatment or care that may be needed for the child.

Third, as in *Vigil*, M.B.'s mother had an understanding of the process that would take place at Project Harmony and consented to Anderson's interview to get M.B. help. Stigge testified that he explained to M.B.'s mother the process that would occur at Project Harmony. Specifically, he requested that she take M.B. there for M.B.'s safety and told her that Project Harmony had therapists that M.B. could speak with. In *Vigil*, we also stated that "psychological treatment is a fundamental component of sexual assault cases and, thus, a component of medical diagnosis and treatment in such cases."[27] It is also relevant that M.B.'s mother was an emergency room nurse and would have a much greater understanding of the followup required for a victim of sexual assault.

Jedlicka's assertion that the absence of certain factors precludes an inference that M.B.'s statements were made for the purpose of medical diagnosis or treatment is without merit. As mentioned above, the circumstances in every case will be different, and no one fact is dispositive in our analysis.

Therefore, based on the circumstances, the court did not err by inferring that M.B. made her statements with the intent to receive medical diagnosis or treatment.

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[27] *Vigil, supra* note 2, 283 Neb. at 141, 810 N.W.2d at 697-98.

### 3. Jedlicka's Trial Counsel Did Not Provide Ineffective Assistance

Jedlicka contends that his trial counsel was ineffective for (l) failing to object to the admission of exhibit 2; (2) failing to develop and marshal a proper and reasonable defense strategy by failing to utilize a rebuttal forensic expert, a DNA expert, and a supporting medical expert; and, as a result, (3) failing to subject the State's case to meaningful adversarial testing.

[15] Jedlicka is represented on direct appeal by different counsel than at trial. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.[28]

[16] An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court.[29] However, the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal.[30] The determining factor is whether the record is sufficient to adequately review the question.[31] An ineffective assistance of counsel claim will not be resolved on direct appeal if it requires an evidentiary hearing.[32]

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[28] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

[29] *Ash, supra* note 3.

[30] *Id.*

[31] *Id.*

[32] *Id.*

### (a) Two Tests for Claims of Ineffective Assistance of Counsel: *Cronic* and *Strickland*

[17-19] In order to assess the adequacy of counsel's assistance under the Sixth Amendment, we ordinarily apply the two-part test enunciated by the U.S. Supreme Court in *Strickland v. Washington*.[33] To prevail on a claim of ineffective assistance of counsel under the *Strickland* analysis, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[34] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[35] The two prongs of this test may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.[36]

[20,21] However, Jedlicka directs us to *United States v. Cronic*,[37] the companion case to *Strickland*. *Cronic* provides narrow exceptions to the *Strickland* analysis, where the reliability of the adversarial process is in such doubt that prejudice to the defendant will be presumed, resulting in a conclusion of ineffective assistance of counsel.[38] The three circumstances where prejudice will be presumed are "(1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel [entirely] fails to subject the

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[33] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[34] *Betancourt-Garcia, supra* note 4.

[35] *Id.*

[36] *Ash, supra* note 3.

[37] *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[38] *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), citing *Cronic, supra* note 37.

prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify the presumption of ineffectiveness without inquiry into counsel's actual performance at trial."[39] These circumstances "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[40]

[22] The Fifth Circuit Court of Appeals described the difference between the *Strickland* and *Cronic* rules as the difference between bad lawyering and no lawyering.[41] It explained:

> The difference between bad and no lawyering is critical . . . because very different results flow from the label which is attached to the conduct in question. If the lawyering is merely ineffective, then the decision to upset the conviction, which turns on the presence of incompetence and prejudice, is made on a case by case basis. *See Strickland*. If, on the other hand, the defendant was constructively denied the assistance of counsel, then the conviction must be overturned because prejudice is presumed. *See Cronic*.[42]

The U.S. Supreme Court emphasized the distinction between the *Strickland* and *Cronic* rules in *Bell v. Cone*.[43] It stated that "[f]or purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind."[44]

In *Cone*, the defendant was being tried for first degree murder. Defense counsel raised mitigating circumstances and asked for mercy in his opening statement, successfully objected to the introduction of prejudicial evidence, and

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[39] *State v. Davlin*, 265 Neb. 386, 401, 658 N.W.2d 1, 12-13 (2003), citing *Trotter, supra* note 38.

[40] *Cronic, supra* note 37, 466 U.S. at 658.

[41] *Woodard v. Collins*, 898 F.2d 1027 (5th Cir. 1990).

[42] *Id.* at 1028.

[43] *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

[44] *Id.*, 535 U.S. at 697.

adduced mitigating facts regarding his client, but he waived his closing argument after a junior prosecutor gave a "'low-key'" closing argument, to prevent the lead prosecutor from having a rebuttal.[45] The Sixth Circuit Court of Appeals applied the second *Cronic* exception to presume prejudice against the defendant, because defense counsel's failure to ask for mercy "did not subject the State's call for the death penalty to meaningful adversarial testing."[46]

[23] The Supreme Court reversed, stating that the second *Cronic* exception did not apply. It emphasized that for the exception to apply, the "attorney's failure must be complete" and emphasized that counsel must "'*entirely* fail[] to subject the prosecution's case to meaningful adversarial testing.'"[47] The following statements by the Court emphasize the difference between *Strickland* and *Cronic* claims:

> Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. . . .
>
> The aspects of counsel's performance challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components.[48]

In accordance with this view, courts rarely apply the *Cronic* exceptions.[49] The Supreme Court confirmed this as the correct approach in *Florida v. Nixon*[50] when it again emphasized

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[45] *Id.*, 535 U.S. at 692.

[46] *Id.*, 535 U.S. at 693.

[47] *Id.*, 535 U.S. at 697 (emphasis in original).

[48] *Id.*, 535 U.S. at 697-98.

[49] See, e.g., *Malcom v. Houston*, 518 F.3d 624 (8th Cir. 2008).

[50] *Florida v. Nixon*, 543 U.S. 175, 189, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).

that counsel must "entirely fail[] to function as the client's advocate." Further, the Court stated: "We illustrated just how infrequently the 'surrounding circumstances [will] justify a presumption of ineffectiveness' in *Cronic* itself. In that case, we reversed a Court of Appeals ruling that ranked as prejudicially inadequate the performance of an inexperienced, underprepared attorney in a complex mail fraud trial."[51] Other courts have similarly rejected claims of ineffective assistance of counsel that are directed at counsel's performance in acting as an advocate for their client.[52]

(b) Jedlicka Did Not Receive Ineffective Assistance of Counsel Under *Cronic* Rule

Jedlicka argues that under *Cronic*, we should presume prejudice in this case. He alleges specific mistakes that his trial counsel made and argues that the aggregate effect of these mistakes constitutes a failure to subject the State's case in chief to meaningful adversarial testing. Additionally, he contends generally that his counsel's cross-examinations of the State's witnesses were wholly ineffective.

As discussed above, allegations of bad lawyering are not proper for consideration under the *Cronic* exceptions. Jedlicka has made no allegations of deficient performance showing his attorney's failure was complete, constituting a constructive denial of the assistance of counsel. As in *State v. Dubray*,[53] Jedlicka's counsel advocated on his behalf as an attorney at trial. Therefore, Jedlicka's reliance upon *Cronic* is misplaced and his allegations of specific mistakes are properly considered under *Strickland* instead.

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[51] *Id.*, 543 U.S. at 190 (citation omitted).

[52] See, e.g., *Malcom, supra* note 49; *Scarpa v. Dubois*, 38 F.3d 1 (1st Cir. 1994).

[53] *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

### (c) Jedlicka's Claims of Ineffective Assistance of Counsel Under *Strickland* Rule

#### *(i) Failure to Object to Exhibit 1*

Jedlicka argues that his trial counsel should have objected to exhibit 1, the picture drawn by M.B. depicting the sleeping arrangement when the assault occurred, because it was hearsay.

Jedlicka cannot establish prejudice by his counsel's failure to object. Both Jedlicka and M.B. testified that the sleeping situation was as depicted by the drawing. Therefore, Jedlicka cannot demonstrate a reasonable probability that the result of the proceeding would have been different if counsel had objected.

#### *(ii) Stigge's Testimony*

Jedlicka contends that his trial counsel's decision to ask Stigge if there were any inconsistencies in Jedlicka's statements during his interrogation opened the door for the prosecution to point out the inconsistencies in his statements on redirect, destroying his credibility. He also specifically identifies one of Stigge's answers, which he argues would have otherwise been inadmissible, as especially damaging to his credibility: "[Prosecutor:] Well, do you feel he was being honest with you? [Stigge:] No, I did not."

Further, Jedlicka asserts that his attorney failed to object to several of the prosecution's leading questions concerning the inconsistencies in his statements and that when his attorney did successfully object to some of the prosecution's questions on the subject, he failed to have the questions stricken from the record.

The record before us is insufficient to determine whether trial counsel's decision to ask about inconsistencies in Jedlicka's statements during his interrogation and his decision to object to only some of the prosecution's leading questions on the

subject were part of his trial strategy. Therefore, we decline to address these questions on direct appeal.

However, the record is sufficient to address his attorney's failure to move to strike the questions he successfully objected to. Both successful objections made by Jedlicka's attorney were made before Stigge answered the prosecutor's objected-to questions. Jury instruction No. 1 read, in part, that "[y]ou must not speculate as to possible answers to questions I did not permit to be answered . . . ." Therefore, Jedlicka cannot show that he was prejudiced by his attorney's failure to have the questions stricken from the record.

*(iii) Failure to Impeach M.B.*

Jedlicka asserts that M.B.'s prior testimony, concerning her sleeping position, was inconsistent with her testimony at trial. In addition to presenting an opportunity to impeach M.B., her prior testimony would have created reasonable doubt as to the feasibility of the assault. However, Jedlicka acknowledges that this allegation cannot be resolved on direct appeal, because M.B.'s deposition is not in evidence. We agree.

*(iv) Failure to Retain Expert Witnesses*

Jedlicka asserts that his trial counsel should have called experts to rebut the following witnesses' testimony: a forensic DNA analyst who testified that testing M.B.'s underwear and vaginal swab for DNA would not have been useful in proving or disproving Jedlicka's guilt; Anderson, whose NCAC interview techniques elicited M.B.'s first allegation of penetration; and Cleaver, who discussed studies supporting her conclusion that digital sexual penetration rarely causes vaginal injuries.

The parties recognize that the record is currently insufficient, because there is no evidence that Jedlicka requested such experts or any evidence concerning his trial counsel's strategy. The State, however, argues that Jedlicka has not sufficiently preserved the record for a postconviction action,

because he did not make any allegations of what such experts would have actually testified to.

[24] We agree with the parties that the record is currently insufficient to review Jedlicka's claims. From our review of the record, we cannot make any meaningful determination whether expert testimony beneficial to Jedlicka could have been produced or, if it could have, whether trial counsel made a reasonable strategic decision not to present certain evidence.[54] The record is, therefore, insufficient to adequately review these claims on direct appeal, and we decline to consider them at this time.[55] As a result, we do not consider the State's contention that Jedlicka's specific allegations of deficient conduct are not sufficient to preserve the record for appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[56]

### 4. There Was Sufficient Evidence to Convict Jedlicka

Jedlicka argues that the court erred in overruling his motion to dismiss, because the prosecution presented insufficient evidence to warrant a conviction. He asserts that his statement of events has never changed, that M.B.'s story has changed—at Anderson's prompting, and that there is no physical evidence of the assault.

[25] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on

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[54] See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[55] See *id.* See, also, *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014); *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

[56] *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017).

the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[57]

Accordingly, we will not review the credibility of Jedlicka or M.B. as witnesses, resolve the conflicts in his or her testimony, or reweigh the evidence of Jedlicka's guilt; these were determinations appropriate only for the trier of fact. We have found no prejudicial error regarding the evidence presented or Jedlicka's assistance of counsel. M.B. testified that Jedlicka assaulted her. Along with the other evidence admitted at trial, all viewed in favor of the State, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that Jedlicka was guilty of first degree sexual assault of a child under 12 years of age. This assignment of error is without merit.

## VI. CONCLUSION

We conclude that exhibit 2 was properly admitted as evidence under the medical diagnosis and treatment hearsay exception. Further, Jedlicka's contentions of ineffective assistance of trial counsel either lack merit or cannot be resolved, because the record on direct appeal is insufficient. Finally, Jedlicka's argument that there was insufficient evidence to support the verdict is without merit. Accordingly, Jedlicka's conviction is affirmed.

Affirmed.

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[57] *Betancourt-Garcia, supra* note 4.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Gary J. Walters et al., appellants, v. Steven W. Colford et al., appellees.

900 N.W.2d 183

Filed July 28, 2017. No. S-16-641.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Trial: Juries: Evidence.** Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.
4. **Summary Judgment: Evidence: Proof.** A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion, who must present evidence showing the existence of a material fact that prevents summary judgment as a matter of law.
5. **Restrictive Covenants.** When restrictive covenants are created for the mutual benefit of all of the properties within a development, they may be enforced by each of the property owners against the other.
6. ____. The doctrine of implied reciprocal negative servitudes allows—under very limited circumstances—a servitude to be created by implication, even where no express servitude applies to the property at issue.
7. ____. The requirements for the application of the doctrine of implied reciprocal negative servitudes are as follows: (1) There is a common

grantor of property who has a general plan or scheme of development for the property; (2) the common grantor conveys a significant number of parcels or lots in the development subject to servitudes (restrictive covenants) designed to mutually benefit the properties in the development and advance the plan of development; (3) it can be reasonably inferred, based on the common grantor's conduct, representations, and implied representations, that the grantor intended the property against which the servitude is implied to be subject to the same servitudes imposed on all of the properties within the plan of development; (4) the property owner against whom the restriction is enforced has actual or constructive notice of the implied servitude; (5) the party seeking to enforce the restriction possesses an interest in property in the development that is subject to the servitude and has reasonably relied upon the representations or implied representations of the common grantor that other properties within the general scheme of development will be subject to the servitude; and (6) injustice can be avoided only by implying the servitude.

8. ____. The law disfavors restrictions on the use of land. Logically, if express restrictive covenants are disfavored under the law, implied restrictive covenants are to be viewed with even less favor.
9. ____. Because implied restrictive covenants mandate relaxation of the writing requirement, courts are generally reluctant and cautious to conclude implied restrictive covenants exist.
10. ____. The doctrine of implied reciprocal negative servitudes should be applied with extreme caution because in effect it lodges discretionary power in a court to deprive a person of his or her property by imposing a servitude through implication.
11. **Property: Boundaries.** Whether a general plan or scheme of development exists and the scope and boundary of that plan are questions of fact.
12. **Property: Intent: Proof.** A grantor's intent to create a plan of development may be proved from the conduct of parties or from the language used in deeds, plats, maps, or general building development plans and by looking to matters extrinsic to related written documents, including conduct, conversation, and correspondence.
13. **Property: Boundaries: Presumptions.** Where property is subdivided or platted pursuant to a plan of development, a presumption arises that the plan of development includes only those properties in the plat or subdivision.
14. **Restrictive Covenants.** The property included within a plan of development, for purposes of the doctrine of implied reciprocal negative servitudes, does not necessarily include all of the developer's land, but can be limited to certain well-defined similarly situated lots.

15. **Property: Boundaries.** Where a development is subdivided or platted in separate phases, each phase constitutes its own separate plan of development.
16. **Restrictive Covenants.** The doctrine of implied reciprocal negative servitudes has no application where a developer follows the practice of creating restrictions on a development through a declaration of restrictions.
17. ____. A buyer of property has no reasonable expectation that neighboring property will be restricted as part of a plan of development pursuant to the doctrine of implied reciprocal negative servitudes where the entire development has been restricted through a declaration of restrictions that does not include that neighboring property.
18. ____. The purpose of the doctrine of implied reciprocal negative servitudes is to protect the reasonable expectations of purchasers of property who reasonably rely on the representations or implied representations of a developer that the other properties within a development will be restricted.
19. ____. Limiting the scope of the implied reciprocal servitudes doctrine to situations where restrictive covenants are placed in individual deeds serves the interest of promoting reliance on our property recording system.

Appeal from the District Court for Butler County: Mary C. Gilbride, Judge. Affirmed.

Jeffrey A. Silver for appellants.

Todd B. Vetter and Luke P. Henderson, of Fitzgerald, Vetter, Temple & Bartell, for appellees Steven W. Colford and Sara J. Colford.

Robert J. Bierbower for appellee Daniel F. Adamy.

Heavican, C.J., Wright, Miller-Lerman, Stacy, Kelch, and Funke, JJ.

Wright, J.

## I. NATURE OF CASE

At issue in this case is whether the property owned by Steven W. Colford and Sara J. Colford is subject to the neighboring subdivision's restrictive covenants by virtue of the doctrine of implied reciprocal negative servitudes. The

district court concluded that it was not and granted summary judgment to the appellees, the Colfords and Daniel F. Adamy. We affirm.

## II. BACKGROUND

### 1. Procedural Background

The appellants, Gary J. Walters and Denise R. Walters, as cotrustees of the Gary J. Walters and Denise R. Walters Trust; Aaron Schmid; Jacquelyne J. Romshek; and Cory Micek (collectively the plaintiffs), brought suit against the Colfords and Adamy. The suit alleges three claims: mandatory injunction for violation of the neighboring subdivision's restrictive covenants, nuisance (derived from the alleged restrictive covenants violation), conspiracy to violate the restrictive covenants, and invasion of privacy (later voluntarily dismissed without prejudice by the plaintiffs).

The Colfords moved for summary judgment. The district court granted the motion with respect to the mandatory injunction claim and the nuisance claim, but not with respect to the invasion of privacy claim. The court's order did not address the conspiracy claim. The court set a pretrial hearing for the remaining issues in the case. The plaintiffs appealed from the court's order. The appeal was dismissed for lack of a final, appealable order. The plaintiffs then voluntarily dismissed their invasion of privacy claim without prejudice. The Colfords again moved for summary judgment, and Adamy joined this motion. The district court granted the motion with respect to the only remaining issue, the conspiracy claim, concluding that because the covenants did not apply to the Colfords' property, there could be no civil conspiracy to violate the covenants. The plaintiffs appealed, and we subsequently moved this case to our docket.

### 2. Factual Background

The plaintiffs are neighbors to the Colfords. The plaintiffs live in a platted subdivision known as the Adamy subdivision.

The Adamy subdivision was platted and dedicated in 1976, and the founding documents were filed with the Butler County register of deeds. The plat and dedication included restrictive covenants, which, among other things, limited the structures on the lots to one single-family, two-story house and one two- or three-car garage. The subdivision contains 14 lots created from a piece of property consisting of around 16.5 acres. The Adamy family also owned much of the property adjacent to the subdivision, including the entire quarter-section (approximately 160 acres) of land in which the subdivision was located.

Adamy later sold some of the property adjacent to the Adamy subdivision without restrictive covenants, including to the Walters. Adamy hired two real estate agents to sell some of the lots in the Adamy subdivision that remained unsold as well as some adjoining property. Adamy did not remember when he hired the two agents.

The record contains promotional brochures produced by the two real estate agents advertising the sale of properties owned by Adamy. The brochures listed the property for sale under the names "Adamy Division" and "Valley View Subdivision." The brochures contained maps of the properties for sale, displaying lots within the Adamy subdivision alongside adjacent property owned by Adamy. That adjacent property included portions or all of the property later sold to the Colfords (the Colford Property), a 5-acre parcel immediately to the west of the Adamy subdivision. One of the brochures listed the restrictive covenants applicable to the Valley View subdivision and said, "These covenants may change. Contact listing agents for more information" (emphasis omitted). Adamy testified that he did not approve of any of the advertising materials produced by his real estate agents.

The Colfords purchased 5 acres of property from Adamy in 2013 for $25,000. When Adamy sold the property to the Colfords, the property was not subject to any restrictive covenants. Later, Adamy placed restrictions on the property that

he and the Colfords negotiated. These new restrictions on the Colford Property were different from those in place on the Adamy subdivision. He testified that he never intended to make the Colford Property subject to the same restrictive covenants that were in place on the Adamy subdivision. The Colfords were aware that there were restrictive covenants in place on the Adamy subdivision, but did not know their details.

After purchasing the property, the Colfords constructed a large metal building, approximately 30 by 50 feet, which the plaintiffs alleged was in violation of the Adamy subdivision covenants. The Colfords used the building to store building material to build a house on the property.

## III. ASSIGNMENT OF ERROR

The Walters claim that the district court erred as a matter of law in granting each of the two motions for summary judgment.

## IV. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3,4] Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is

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[1] *Pierce v. Landmark Management Group, Inc.*, 293 Neb. 890, 880 N.W.2d 885 (2016).

[2] *Id.*

the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.[3] A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial.[4] At that point, the burden of producing evidence shifts to the party opposing the motion, who must present evidence showing the existence of a material fact that prevents summary judgment as a matter of law.[5]

## V. ANALYSIS

### 1. The Plaintiffs' Claim for Injunctive Relief: Adamy Subdivision Restrictive Covenants Do Not Expressly Apply to the Colford Property

There is no evidence that the Colford Property is expressly subject to the Adamy subdivision restrictive covenants. The Colford Property is not a part of the Adamy subdivision. The Adamy subdivision restrictive covenants expressly apply only to the lots within the subdivision. The plaintiffs may prevail only if they can establish that the Colford Property is restricted through the doctrine of implied reciprocal negative servitudes.

### 2. The Plaintiffs' Claim for Injunctive Relief: Application of Doctrine of Implied Reciprocal Negative Servitudes to the Colford Property

The plaintiffs argue that the Colford Property is subject to the Adamy subdivision restrictions through the doctrine of implied reciprocal negative servitudes. The district court concluded that there was no material issue of fact as

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[3] *Id.*

[4] *Id.*

[5] *Id.*

to the application of the doctrine because "[a]lthough all of the land at issue was conveyed by a common grantor, there is no showing that the grantor had a common plan of development for the Colford land or had any intent to restrict the use of it."

(a) Overview of Doctrine

[5] Restrictive covenants on property use are often utilized in developments to maintain the character of the neighborhood in accord with the development plan and to protect property values.[6] When restrictive covenants are created for the mutual benefit of all of the properties within a development, they may be enforced by each of the property owners against the other.[7] While at common law, restrictive covenants on land use were categorized as either "real covenants" or "equitable servitudes" depending on whether they were enforced in law or equity, the distinction between these two has blurred over time.[8]

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[6] See, generally, 1 Restatement (Third) of Property: Servitudes § 2.14, comment *a*. (2000); *Citizens for Cov. Comp. v. Anderson*, 12 Cal. 4th 345, 352, 906 P.2d 1314, 1318, 47 Cal. Rptr. 2d 898, 902 (1995) ("[m]odern subdivisions are often built according to a general plan containing restrictions that each owner must abide by for the benefit of all").

[7] See, *Plumb v. Ruffin*, 213 Neb. 335, 328 N.W.2d 792 (1983); *Reed v. Williamson*, 164 Neb. 99, 82 N.W.2d 18 (1957). See, generally, 1 Restatement, *supra* note 6.

[8] 9 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 60.01[5] at 60-11 (2000). See, generally, *id*., § 60.01[4] and [5]; 7 Thompson on Real Property §§ 61.02(b) and (c) and 61.05 (David A. Thomas 2d ed. 2006); 1 Restatement, *supra* note 6, §§ 1.4 and 2.1, comment *a.*; *Citizens for Cov. Comp. v. Anderson, supra* note 6, 12 Cal. 4th at 348, 906 P.2d at 1316, 47 Cal. Rptr. 2d at 900 (referring to law of real covenants and equitable servitudes as "'the most complex and archaic body of American property law remaining in the twentieth century'" and as "'an unspeakable quagmire'").

The modern trend, as represented by the Restatement (Third) of Property: Servitudes,[9] is to refer to both real covenants and equitable servitudes simply as servitudes.

[6,7] The doctrine of implied reciprocal negative servitudes[10] allows—under very limited circumstances—a servitude to be created by implication, even where no express servitude applies to the property at issue. The requirements for the application of this doctrine are as follows: (1) There is a common grantor of property who has a general plan or scheme of development for the property;[11] (2) the common grantor conveys a significant number of parcels or lots in the development subject to servitudes (restrictive covenants) designed to mutually benefit the properties in the development and advance the plan of

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[9] See, 1 Restatement, *supra* note 6, §§ 1.3 and 1.4; 9 Powell & Wolf, *supra* note 8, § 60.01[6]. See, also, generally, Lawrence Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 Wash. & Lee L. Rev. 337 (1986); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177 (1982); Ralph A. Newman & Frank R. Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?*, 21 Hastings L.J. 1319 (1970).

[10] See, generally, 1 Restatement, *supra* note 6, § 2.14; 20 Am. Jur. 2d *Covenants, Etc*. § 156 (2015); 21 C.J.S. *Covenants* § 4 (2016); *Krueger v. Oberto*, 309 Ill. App. 3d 358, 724 N.E.2d 21, 243 Ill. Dec. 712 (1999); *Schovee v. Mikolasko*, 356 Md. 93, 737 A.2d 578 (1999); *Evans v. Pollock*, 796 S.W.2d 465 (Tex. 1990); *Sharts v. Walters*, 107 N.M. 414, 759 P.2d 201 (N.M. App. 1988); *Mid-State Equipment Co. v. Bell*, 217 Va. 133, 225 S.E.2d 877 (1976); *Williams v. Waldrop*, 216 Ga. 623, 118 S.E.2d 465 (1961); *Nashua Hospital v. Gage*, 85 N.H. 335, 159 A. 137 (1932); *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925).

[11] *Skyline Woods Homeowners Assn. v. Broekemeier*, 276 Neb. 792, 758 N.W.2d 376 (2008); *Egan v. Catholic Bishop*, 219 Neb. 365, 363 N.W.2d 380 (1985).

development;[12] (3) it can be reasonably inferred, based on the common grantor's conduct, representations, and implied representations, that the grantor intended the property against which the servitude is implied to be subject to the same servitudes imposed on all of the properties within the plan of development;[13] (4) the property owner against whom the restriction is enforced has actual or constructive notice of the implied servitude;[14] (5) the party seeking to enforce the restriction possesses an interest in property in the development that is subject to the servitude and has reasonably relied upon the representations or implied representations of the common grantor that other properties within the general scheme of development will be subject to the

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[12] See *Egan v. Catholic Bishop, supra* note 11, 219 Neb. at 370, 363 N.W.2d at 384 (stating that doctrine applies where common grantor "by numerous conveyances incorporates in the deeds substantially uniform restrictions, conditions, and covenants against the use of the property"). See, also, *Patch v. Springfield School Dist.*, 187 Vt. 21, 33, 989 A.2d 500, 508 (2009) (requiring for application of doctrine that "'vast majority of subdivided lots contain restrictive covenants which reflect the general scheme'").

[13] See, *Skyline Woods Homeowners Assn. v. Broekemeier, supra* note 11; *Egan v. Catholic Bishop, supra* note 11; *Nashua Hospital v. Gage, supra* note 10, 85 N.H. at 339, 159 A. at 139 (requiring that "'restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold'").

[14] See, *Skyline Woods Homeowners Assn. v. Broekemeier, supra* note 11, 276 Neb. at 811, 758 N.W.2d at 390-91 ("'[t]he recording acts have not abolished the equity rule as to actual and constructive notice.' Under this rule, we consider whether there are circumstances which, in the exercise of common reason and prudence, ought to put a man upon particular inquiry. If so, then the purchaser will be charged with notice of every fact which an inquiry, if made, would have given him or her"); *Egan v. Catholic Bishop, supra* note 11.

servitude;[15] and (6) injustice can be avoided only by implying the servitude.[16]

[8-10] While the doctrine of implied reciprocal negative servitudes has a long pedigree and is well established,[17] courts tend to use it only with great trepidation. We have said that the law disfavors restrictions on the use of land.[18] As one court reasoned, "Logically, if express restrictive covenants are disfavored under the law, implied restrictive covenants are to be viewed with even less favor."[19] We have also said that because implied restrictive covenants mandate relaxation of the writing requirement, courts are generally reluctant and cautious to conclude implied restrictive covenants exist.[20] As another court said, "the doctrine [of implied reciprocal negative servitudes] should be applied with extreme caution because in

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[15] See, *Skyline Woods Homeowners Assn. v. Broekemeier, supra* note 11; *Egan v. Catholic Bishop, supra* note 11. See, also, *Ski Masters of Texas, LLC v. Heinemeyer*, 269 S.W.3d 662, 669 (Tex. App. 2008) ("[q]uestions about standing are implicated whenever a property owner seeks to enforce such a restrictive covenant. Standing essentially depends on two things: (1) the existence of a general plan or scheme of development (2) that was part of the inducement for purchasers to obtain land within the restricted area") (citing *Hooper v. Lottman*, 171 S.W. 270 (Tex. App. 1914)).

[16] 1 Restatement, *supra* note 6, § 2.14(2)(b). See, also, *Sullivan v. O'Connor*, 81 Mass. App. 200, 961 N.E.2d 143 (2012). Cf. *Mountain High Homeowners Assn. v. J.L. Ward*, 228 Or. App. 424, 438, 209 P.3d 347, 355 (2009) (limiting creation of implied equitable servitudes by estoppel to where "establishment of a servitude is necessary to avoid injustice").

[17] E.g., *Evans v. Pollock, supra* note 10, 796 S.W.2d at 466 ("implied reciprocal negative easement doctrine has long been recognized in many jurisdictions").

[18] See, *Latenser v. Intercessors of the Lamb, Inc*., 250 Neb. 789, 553 N.W.2d 458 (1996); *Egan v. Catholic Bishop, supra* note 11.

[19] *Collins v. Rodgers*, 938 So. 2d 379, 385 (Ala. 2006).

[20] *Skyline Woods Homeowners Assn. v. Broekemeier, supra* note 11.

effect it lodges discretionary power in a court to deprive a [person] of his [or her] property by imposing a servitude through implication."[21] Some courts, in agreement with the Restatement drafters, require clear and convincing evidence to establish that a property is subject to the restrictions of an implied reciprocal negative servitude.[22]

[11,12] Whether a general plan or scheme of development exists and the scope and boundary of that plan are questions of fact.[23] The Restatement commentary explains:

> Representations by the developer normally provide the basis for finding that land was conveyed pursuant to a general plan of development. The representations may take the form of direct expressions that the project is a planned development, a restricted community, a quality residential subdivision, or the like. Representations may be found in advertisements, brochures, or statements

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[21] *Galbreath v. Miller*, 426 S.W.2d 126, 128 (Ky. 1968). See, also, *Land Developers, Inc. v. Maxwell*, 537 S.W.2d 904, 913 (Tenn. 1976) (stating that doctrine should be applied with "'"extreme caution"'"); *Saccomanno v. Farb*, 492 S.W.2d 709, 713 (Tex. App. 1973) (stating that doctrine should be applied with "extreme caution").

[22] 1 Restatement, *supra* note 6, § 2.14, comment *f*. See, also, *The Greylag 4 Maint. Corp. v. Lynch-James*, No. CIV.A. 205-N, 2004 WL 2694905 at *5 (Del. Ch. Oct. 6, 2004) (requiring "the party asserting the common plan doctrine [to] show, by clear and convincing evidence, that a common plan in fact existed") (citing *Leon N. Weiner & Associates v. Krapf*, 623 A.2d 1085 (Del. 1993)); *Joslyn v. Woods*, No. 2001-CA-000320-MR, 2003 WL 1246955 (Ky. App. Feb. 14, 2003) (requiring proof by clear and convincing evidence for doctrine of implied reciprocal easements) (citing *Bellemeade Company v. Priddle*, 503 S.W.2d 734 (Ky. 1973)); *McKenrick v. Savings Bank*, 174 Md. 118, 128, 197 A. 580, 585 (1938) (requiring "clear and satisfactory proof" to establish existence of general scheme of development and that land in question was intended by common grantor to be subject to restrictions as part of scheme).

[23] 1 Restatement, *supra* note 6, § 2.14, comment *f*.; *Ski Masters of Texas, LLC v. Heinemeyer, supra* note 15.

> made by sales personnel. Indirect representations may be found in maps, or pictures displayed to prospective purchasers. Representations may also be found in the language or nature of the servitudes imposed on the lots conveyed.[24]

We said in *Skyline Woods Homeowners Assn. v. Broekemeier*[25] that a grantor's intent to create a plan of development may be proved "from the conduct of parties or from the language used in deeds, plats, maps, or general building development plans" and by looking "'to matters extrinsic to related written documents, including conduct, conversation, and correspondence.'"

[13] Determining which properties are included within a plan of development is relatively easy where land is platted or subdivided, because "[i]n the absence of other evidence, the inference is normally justified that all of the land within a platted subdivision is subject to the general plan, and that land outside the subdivision is not included."[26] Thus, where property is subdivided or platted pursuant to a plan of development, a presumption arises that the plan of development includes only those properties in the plat or subdivision.[27]

[14,15] The property included within a plan of development, for purposes of the doctrine, does not necessarily include all

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[24] 1 Restatement, *supra* note 6, § 2.14, comment *f*. at 185. See, also, generally, *Country Community v. HMW Special Utility*, 438 S.W.3d 661 (Tex. App. 2014); *Swanson v. Green*, 572 So. 2d 1246 (Ala. 1990).

[25] *Skyline Woods Homeowners Assn. v. Broekemeier, supra* note 11, 276 Neb. at 805, 758 N.W.2d at 387.

[26] 1 Restatement, *supra* note 6, § 2.14, comment *g*. at 187. See, also, generally, *Roper v. Camuso*, 376 Md. 240, 261, 829 A.2d 589, 602 (2003) ("cases considering implied restrictions on land retained by a common grantor have turned on two key inquiries: whether (1) there was a general plan of development, and (2) if so, the retained land was intended to be a part of the development").

[27] See 1 Restatement, *supra* note 6, § 2.14, comment *g*.

of the developer's land, but can be limited to "certain well-defined similarly situated lots."[28] And where a development is subdivided or platted in separate phases, each phase constitutes its own separate plan of development.[29]

In addition to the aforementioned limitations on the scope of this doctrine, there is another limitation on its application that is key to the resolution of the case at bar.

### (b) Gap-Filling Function of Doctrine

The doctrine of implied reciprocal negative servitudes functions as a gap-filler. It is an equitable doctrine created to protect property owners. Where a property owner purchases a lot from a developer that is subject to a restrictive covenant in the individual lot deed, but where the developer subsequently conveys a lot within the development without a restriction in the deed, the doctrine steps in to fill the gap. It fills the gap in order to protect the other property owners' reasonable expectations that all of the lots within the plan of development will be similarly restricted.

The doctrine arose in the historical context of a time in which developers typically restricted properties within a plan

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[28] *Evans v. Pollock, supra* note 10, 796 S.W.2d at 471. See, also, *Byrd v. Mahrou*, No. 03-14-00441-CV, 2016 WL 3974702 (Tex. App. July 22, 2016).

[29] 1 Restatement, *supra* note 6, § 2.14, comment *g*. at 187 ("[w]hen a tract is developed in phases, with separate units or subdivisions, the imposition of servitudes in one phase should not give rise to the implication of reciprocal servitudes burdening the remaining units or subdivisions"). See, *Evans v. Pollock, supra* note 10; *Duvall v. Ford Leasing*, 220 Va. 36, 42, 255 S.E.2d 470, 473 (1979) (holding, in situation where development "was developed in stages, the various sections having been created from time to time over a period of many years by the recordation of a number of deeds of dedication and plats," that "each of these recordings created a separate and distinct subdivision, with its own set of restrictions benefiting and burdening only the land in that particular subdivision").

of development by placing restrictive covenants in each individual property deed. As one court explained:

> [T]he implied negative reciprocal easement or servitude doctrine arose before the advent of comprehensive zoning in order to provide a measure of protection for those who bought lots in what they reasonably expected was a general development in which all of the lots would be equally burdened and benefitted. In those early days, it was uncommon for the developer to evidence the development or impose uniform restrictions through a recorded Declaration that would later be incorporated in individual deeds. They often filed subdivision plats of one kind or another but did not take the extra step of using one instrument to impose the restrictions. The common, almost universal, practice, instead, was for the developer to place the restrictions in the deeds to individual lots and, sometimes, to represent to the purchasers of those lots that the same restrictions would be placed in subsequent deeds to the other lots. Litigation arose most frequently when the developer then neglected to include the restrictions in one or more of the subsequent deeds and those buyers proceeded or proposed to use their property in a manner that would not be allowed by the restrictions.[30]

Because developers historically restricted properties as part of their plan of development on a deed-by-deed basis, the doctrine was created to fill the gap where a property was conveyed without restrictions in the deed.

But a common practice today is for developers to place restrictions on an entire development all at once through

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[30] *Schovee v. Mikolasko, supra* note 10, 356 Md. at 107-08, 737 A.2d at 586 (citing Restatement (Third) of Property: Servitudes § 2.14, comment *b*. (Tentative Draft No. 1, 1989)).

executing and recording a declaration of restrictions.[31] Where this occurs, there is no need for the doctrine's gap-filling function. The drafters of the Restatement took the position that the doctrine has no application where a development's restrictions are created through a declaration of restrictions rather than through restrictive covenants placed in individual lot deeds:

> The idea underlying the [implied-reciprocal-servitude] doctrine is that when a purchaser buys land subject to restrictions imposed to carry out a general plan of development, the purchaser is entitled to assume that all the land in the development is, or will be, similarly restricted to carry out the general plan. By selling land with restrictions designed to put into effect a general plan of development, the developer impliedly represents to the purchasers that the rest of the land included in the plan is, or will be, similarly restricted. That representation is enforced, on the grounds of estoppel, by imposing an implied reciprocal servitude on the developer's remaining land included in the plan. Because the implied-reciprocal-servitude doctrine undercuts the Statute of Frauds and creates uncertainty in land titles, it should be applied only when the existence of a general plan is clear and establishment of the servitude is necessary to avoid injustice.
>
> *The implied-reciprocal-servitude doctrine comes into play only when the developer does not follow the practice of recording a declaration of servitudes applicable to the entire subdivision or other general-plan area.* The

[31] See Black's Law Dictionary 495 (10th ed. 2014) (defining "declaration of restrictions" as "statement of all the covenants, conditions, and restrictions affecting a parcel of land, usu[ally] imposed and recorded by a developer of a subdivision. The restrictions usu[ally] promote a general plan of development by requiring all lot owners to comply with the specified standards, esp[ecially] for buildings. The restrictions run with the land").

> doctrine protects the interests of purchasers who relied on continued effectiveness of the general plan when the developer decides to deviate from the general plan of development before all lots have been sold. If the purchasers have reasonably relied on the implied representations that all lots will be sold subject to the general-plan restrictions, and injustice can only be avoided by establishment of the implied servitude, the purchasers are entitled to the protection of an implied reciprocal servitude burdening the lots remaining in the developer's hands.[32]

[16] We agree with the Restatement that the doctrine of implied reciprocal negative servitudes has no application where a developer follows the practice of creating restrictions on a development through a declaration of restrictions. We agree with this approach because it furthers the interests of protecting the reasonable expectations of property purchasers and promoting reliance on our property recording system.

[17] A buyer of property has no reasonable expectation that neighboring property will be restricted as part of a plan of development where the entire development has been restricted through a declaration of restrictions that does not include that neighboring property. Such a buyer knows, or should know, that the neighboring property is not a part of the development and not necessarily subject to the same restrictions as the buyer's property.

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[32] 1 Restatement, *supra* note 6, § 2.14, comment *i*. at 191 (emphasis supplied). See, also, *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wash. App. 411, 422, 166 P.3d 770, 776 (2007) (stating that "implied-reciprocal-servitude doctrine applies only when the developer does not follow the practice of recording a declaration applicable to the entire subdivision or general-plan area"). But see, *Roper v. Camuso, supra* note 26; *Schovee v. Mikolasko, supra* note 10 (declining to adopt Restatement's categorical rule that doctrine does not apply where developer uses declaration, but, instead, creating strong presumption that doctrine does not apply beyond scope of declaration).

[18] The purpose of the doctrine is to protect the reasonable expectations of purchasers of property who reasonably rely on the representations or implied representations of a developer that the other properties within a development will be restricted. But the need for implied restrictions is obviated when the entire plan of development is restricted at once with a declaration of restrictions. A purchaser of property within such a development knows precisely what properties are—and what properties are *not*—subject to the same restrictions. The buyer can look at the records. The declaration tells the buyer what the restrictions are and to what properties they apply. Where the restrictions of a development are imposed all at once through a declaration of restrictions, the doctrine of implied reciprocal negative servitudes is not necessary to protect reasonable expectations of property buyers, because the buyer knows exactly what he or she is getting.

[19] Limiting the scope of the implied reciprocal servitudes doctrine to situations where restrictive covenants are placed in individual deeds also serves the interest of promoting reliance on our property recording system. By definition, an *implied* servitude is not written and recorded. A prospective property purchaser cannot trek down to the local register of deeds and see if there are any *implied* servitudes on a particular piece of property. The potential for unwritten, unrecorded, implied servitudes creates uncertainty. This uncertainty is at odds with our recording system, which aims to yield clear answers about the ownership of property. Where a purchaser of property can find a recorded declaration of restrictions, showing the scope of a development's restrictions, the purchaser should be able to rely on that information.

The doctrine of implied reciprocal negative servitudes does not apply where the grantor restricts all of the properties within a planned development through a declaration of restrictions. Where the grantor uses a declaration, the express restrictions within the declaration control within the plan of

development. The doctrine does not apply to property outside the planned development.

Here, the restrictive covenants placed on the Adamy subdivision were created through a plat and declaration in 1976. The restrictions were put in place as to all of the lots within the planned development. At the time the plaintiffs purchased their lots within the subdivision, the plat and declaration document was on file with the Butler County register of deeds. All of the plaintiffs had the opportunity to look at that record. Had they done so, they would have seen that the Colford Property was not a part of their subdivision and not subject to the same restrictions. With this information available, the plaintiffs had no reasonable expectation that the Colford Property would be subject to the Adamy subdivision restrictions, regardless of what any real estate sales brochures may have implied. We affirm the district court's grant of summary judgment.

### 3. The Plaintiffs' Nuisance and Conspiracy Claims

The plaintiffs' nuisance and conspiracy claims are premised on the alleged violation of the Adamy subdivision restrictive covenants. Because we conclude that these restrictions do not apply to the Colford Property through the doctrine of implied reciprocal negative servitudes, these claims fail as a matter of law. We affirm the district court's order granting summary judgment on these claims.

## VI. CONCLUSION

For the reasons set forth in this opinion, we affirm the judgment of the district court.

Affirmed.

Cassel, J., participating on briefs.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Jane and John Doe, wife and husband, appellants, v. William Bruce McCoy, appellee.

899 N.W.2d 899

Filed July 28, 2017. No. S-16-746.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Limitations of Actions.** The determination of which statute of limitations applies is a question of law.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Statutes: Legislature.** In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
5. **Limitations of Actions.** The time limitation of Neb. Rev. Stat. § 25-228 (Reissue 2016) does not apply to actions for which the existing statute of limitations had run at the time § 25-228 was enacted.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Daniel H. Friedman, of Friedman Law Offices, P.C., L.L.O., for appellants.

James Martin Davis, of Davis Law Office, for appellee.

Danny C. Leavitt for amicus curiae Nebraska Association of Trial Attorneys.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller-Lerman, J.

## NATURE OF CASE

The plaintiffs in this case, who filed their complaint using the pseudonyms "Jane Doe" and "John Doe," appeal the order of the district court for Douglas County which dismissed their complaint against William Bruce McCoy. The court determined that the complaint should be dismissed for two reasons: (1) The action was time barred under the applicable statutes of limitations, and (2) the complaint was not brought in the real names of the parties in interest. We affirm the dismissal of the complaint on the basis that the statutes of limitations barred the action. Because that determination is dispositive of this appeal, we do not consider the issue regarding the plaintiffs' names.

## STATEMENT OF FACTS

On February 3, 2016, the plaintiffs herein filed a complaint in the district court using the pseudonyms "Jane Doe" and "John Doe." In the complaint, they set forth a tort cause of action in which they alleged that McCoy had engaged in acts of sexual battery, exhibitionism, and voyeurism that caused "Jane Doe" severe harm and extreme emotional distress and caused "John Doe" a loss of consortium. They generally alleged that McCoy was "Jane Doe's" mother's boyfriend and that on "innumerable occasions" beginning in 1991 and continuing through 1999, McCoy had sexually abused "Jane Doe" and her sister. "Jane Doe" was born in 1985 and was a minor throughout the duration of the alleged sexual abuse. "Jane Doe" married "John Doe" on April 17, 2014, and the plaintiffs claimed that "John Doe" suffered a loss of consortium as a result of McCoy's alleged sexual abuse of "Jane Doe."

McCoy filed a motion to dismiss the complaint on the bases that (1) the claims were barred by the applicable statutes of limitations and the plaintiffs alleged no facts that would exempt the claims from the statutes of limitations and

(2) the complaint failed to state a claim because the action was not brought in the plaintiffs' real names as required by Neb. Rev. Stat. § 25-301 (Reissue 2016). Prior to a hearing on the motion to dismiss, "Jane and John Doe" filed with the court a confidential document in which they disclosed their real names.

After the hearing, the court filed an order an July 27, 2016, which granted McCoy's motion to dismiss on both bases. With regard to the statutes of limitations, the court indicated that McCoy contended that only two applicable statutes read together controlled this case: Neb. Rev. Stat. § 25-207 (Reissue 2016) (action for tort damages must be brought within 4 years after action accrues) and Neb. Rev. Stat. § 25-213 (Reissue 2016) (if plaintiff is minor at time tort cause of action accrues, statute of limitations is tolled until plaintiff reaches age 21). The court determined that the tort was alleged to have occurred between 1991 and 1999, and that "Jane Doe" turned 21 on September 21, 2006. The court observed that if § 25-213 controlled, with the addition of 4 years, the statutes of limitations ran on September 21, 2010.

The court acknowledged the plaintiffs' argument that Neb. Rev. Stat. § 25-228 (Reissue 2016) applied to this case. Section 25-228 generally provides that in the case of a tort action in which the plaintiff is a victim of sexual assault of a child, the statute of limitations is extended to 12 years after the plaintiff reaches age 21. However, the court noted that § 25-228 was enacted in 2012 and did not become effective until July 19, 2012. The court stated that although the general rule is that the limitation period in effect at the time an action is filed controls, one of the exceptions to this general rule is that a defendant may not be deprived of a bar that has already become complete. The court concluded that because the bar in this case had become complete on September 21, 2010, the limitation period under § 25-228, which did not become effective until July 19, 2012, did not apply. The court concluded

that the complaint should be dismissed because the action was time barred.

With regard to the use of pseudonyms, the court stated that § 25-301 requires that all actions be brought in the name of the real party in interest and that although Nebraska case law acknowledged that in certain cases, a trial court may allow a party to bring an action under a pseudonym, a party seeking to do so must first receive approval from the court, which the plaintiffs in this case failed to do. The court further determined that even if the plaintiffs had timely petitioned the court to proceed anonymously, it would not have granted the request. The court reasoned that although the nature of the allegations in this case would be "very difficult for [Jane] Doe to relive . . . and be publically associated with," the allegations were "simply not 'exceptional' enough to overcome [the] customary and constitutionally-embedded presumption of openness in judicial proceedings." The court further stated that while it was common to preserve the anonymity of plaintiffs in cases involving minors, "Jane Doe" was no longer a minor and "should not be given any special deference in her request to proceed anonymously." The court concluded that the complaint should be dismissed because it was not brought in the names of the real parties in interest.

The plaintiffs appeal the order dismissing their complaint.

## ASSIGNMENTS OF ERROR

The plaintiffs claim that the district court erred when it (1) ruled that the action was time barred and (2) ruled that they should not be allowed to proceed anonymously.

## STANDARDS OF REVIEW

[1] A district court's grant of a motion to dismiss is reviewed de novo. *Harring v. Gress*, 295 Neb. 852, 890 N.W.2d 502 (2017).

[2,3] The determination of which statute of limitations applies is a question of law. *Lindner v. Kindig*, 293 Neb. 661,

881 N.W.2d 579 (2016). An appellate court independently reviews questions of law decided by a lower court. *Id*.

## ANALYSIS

We first consider the statutes of limitations issue, and we conclude that the action in this case was barred by the applicable statutes of limitations and that therefore the district court did not err when it dismissed the plaintiffs' complaint. Because that conclusion is determinative of the appeal, we need not consider the plaintiffs' assignment of error regarding the court's ruling that the plaintiffs should not be allowed to proceed anonymously. See *Irwin v. West Gate Bank*, 288 Neb. 353, 848 N.W.2d 605 (2014) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

The district court determined that the only applicable statutes of limitations in this case were § 25-207, which provides that an action for tort damages must be brought within 4 years after the action accrues, and § 25-213, which provides that if the plaintiff is a minor at the time the tort cause of action accrues, the statutes of limitations are tolled until the plaintiff reaches age 21. Reading these statutes together and applying them to the facts alleged in the complaint, the court determined that the action accrued when "Jane Doe" was a minor, that she turned 21 in 2006, and that the statutes of limitations ran in 2010. The court concluded therefore that the action was barred at the time the plaintiffs filed it in 2016.

The plaintiffs argue on appeal that the district court erred when it rejected their argument that the action was timely, because § 25-228 extended the limitation period. At the time the plaintiffs filed their complaint, § 25-228 provided as follows:

> Notwithstanding any other provision of law, actions for an injury or injuries suffered by a plaintiff when the plaintiff was a victim of a violation of section 28-319.01 or 28-320.01 can only be brought within twelve years after

> the plaintiff's twenty-first birthday. Criminal prosecution of a defendant under section 28-319.01 or 28-320.01 is not required to maintain a civil action for violation of such sections.

We note that Neb. Rev. Stat. §§ 28-319.01 and 28-320.01 (Reissue 2016) pertain to sexual assault of a child. The plaintiffs argue that § 25-228, which was enacted in 2012, applied to their complaint and that pursuant to § 25-228, they had until September 21, 2018, which is 12 years after "Jane Doe" turned 21, to file their action. The plaintiffs therefore reason that their complaint filed February 3, 2016, was timely.

The district court determined, however, that § 25-228 did not apply to the action in this case, because the statutory bar pursuant to §§ 25-207 and 25-213 was complete in 2010 and § 25-228, which was enacted after 2010, could not overcome the completed bar. The court relied on *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994), in which this court stated that although the limitation period in effect at the time an action is filed generally governs the action, the Legislature may not, inter alia, deprive a defendant of a bar which has already become complete. This court in *Schendt v. Dewey* relied on *Givens v. Anchor Packing*, 237 Neb. 565, 569, 466 N.W.2d 771, 773 (1991), in which this court had stated that a statutory "amendment cannot resurrect an action which the prior version of the statute had already extinguished." This court reasoned in *Givens v. Anchor Packing* that the rule was "grounded upon the due process guarantee found in Neb. Const. art. I, § 3, which prevents persons from being deprived of their property without due process of law," and that "immunity granted [to a defendant] by a completed statutory bar," like a plaintiff's right to recover on a judgment, "is a vested right which cannot be impaired by a subsequent legislative act." 237 Neb. at 569, 466 N.W.2d at 773, 774. The district court in this case concluded that McCoy "gained a vested right in the time-bar on September 21, 2010, under

the Nebraska Constitution, which outweighs any subsequent action by the Legislature."

For completeness, we note that with regard to limitations of actions, a distinction is often made between statutes of limitations and statutes of repose. See *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 582 U.S. 497, 137 S. Ct. 2042, 198 L. Ed. 2d 584 (2017). However, in *Givens v. Anchor Packing, supra*, we stated that whether the statute at issue in that case was "characterized as a statute of repose . . . or as a statute of limitations . . . it [was] a statute prescribing limitations on actions" and that "[a]s such, its amendment cannot resurrect an action which the prior version of the statute had already extinguished." 237 Neb. at 569, 466 N.W.2d at 773.

The plaintiffs argue that the precedent cited by the district court to prohibit application of § 25-228 should not be applied to this case. In addition to arguing that such precedent was wrongly decided, they note that § 25-228 states that the time limitation set forth therein shall apply "[n]otwithstanding any other provision of law." The plaintiffs argue that such language should be read as showing a legislative intent to circumvent the rule set forth in *Schendt v. Dewey* and *Givens v. Anchor Packing*. In effect, they argue that "any other provision of law" as used in § 25-228 includes Neb. Const. art. I, § 3, and that the case law applying that constitutional provision which holds that the immunity granted to a defendant by a completed bar cannot be impaired by a subsequent legislative act, has become inapplicable by the language of § 25-228. They argue that the language indicates that the Legislature intended § 25-228 to apply to cases like theirs, "notwithstanding" the constitutional provision and this court's prior interpretation of it.

[4] We note that contrary to the reading of "any other provision of law" in § 25-228 as urged by the plaintiffs, the word "law" could reasonably be read as referring to any other statute of limitations that might be applicable to an action

described in § 25-228. Assuming that the plaintiffs' urged reading is also a reasonable interpretation of the statutory language, § 25-228 could be considered ambiguous and therefore open to construction by reference to its legislative history. See *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 1016, 885 N.W.2d 723, 728 (2016) ("[i]n order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous").

Regarding the legislative history of § 25-228, we note that during floor debate of the bill that became § 25-228, the sponsor of the bill stated, "[T]here is no attempt at retroactivity to the extent that statute[s] of limitations under the currently existing paradigm have already run," Floor Debate, L.B. 612, Judiciary Committee, 102d Leg., 2d Sess. 36 (Jan. 27, 2012), and "in terms of fairness, this does not resurrect any already extinct cases under the prior statute[s] of limitations," *Id*. at 38. While stating that the bill would not "resurrect" actions upon which the existing statutes of limitations had run, the sponsor added that the Legislature did not have the authority to do so, stating that "any legislator lacks the constitutional authority to go back and, so to speak, unextinguish [sic] already extinguished statute[s] of limitations. . . . [T]he case law has been quite clear on that." *Id*. at 36.

[5] The legislative history of § 25-228 therefore indicates that the Legislature did not intend for the new time limitation to apply to actions for which the existing statute of limitations had run at the time § 25-228 was enacted. Therefore, to the extent the phrase "any other provision of law" in § 25-228 is ambiguous, the legislative history makes clear that the Legislature did not intend for the language to indicate, as the plaintiffs urge, that the new statute, § 25-228, would apply "notwithstanding" Neb. Const. art. I, § 3, and this court's interpretation of this constitutional provision. Leaving aside the question whether the Legislature could exempt a statute

from the requirements of a constitutional provision, the legislative history for § 25-228 indicates that in this instance, the Legislature did not attempt to do so.

Because the Legislature did not intend in § 25-228 to impair a defendant's vested right in a completed bar, we need not consider the plaintiffs' challenge to *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991), and the related line of cases. Instead, we apply the statute in the manner the Legislature enacted it, and we determine that § 25-228 does not apply to an action that was already barred under the existing statutes of limitations at the time § 25-228 was enacted in 2012.

We note for completeness that on May 3, 2017, the Legislature passed L.B. 300, which repeals the version of § 25-228 that was enacted in 2012 and enacts a new version which provides, inter alia, that no time limitation applies to the types of actions specified in the statute, but that the new version of the statute applies to a violation that occurred prior to the effective date of the amendment only "if such action was not previously time barred." The Governor approved L.B. 300 on May 9, but L.B. 300 did not contain an emergency clause, and therefore it will not be effective until 3 months after the Legislature adjourned its 2017 session. See Neb. Const. art. III, § 27. We note that in this case, we examine and apply the version of § 25-228 in effect from the enactment of the statute in 2012 until the effective date of L.B. 300.

Because the applicable statutes of limitations on the plaintiffs' action against McCoy had run in 2010, and because § 25-228 did not extend the period of limitations for actions that had already been barred when it was enacted in 2012, we conclude that the district court did not err when it determined that the plaintiffs' action was barred when they filed their complaint in 2016. The determination that the action was barred by the statutes of limitations was sufficient to support the dismissal of "Jane Doe's" causes of action, and, because "John Doe's" allegations are derivative of a viable complaint

filed by "Jane Doe," see *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 770 N.W.2d 619 (2009), and *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994), his cause of action for loss of consortium was also properly dismissed.

## CONCLUSION

We conclude that the action in this case was barred by the applicable statutes of limitations. Because this determination is dispositive of the appeal, we do not consider the issue regarding the plaintiffs' use of pseudonyms. We therefore affirm the district court's order dismissing the plaintiffs' complaint.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Jimmy R. Barnes, Jr., appellant, v. American Standard Insurance Company of Wisconsin, appellee.

900 N.W.2d 22

Filed July 28, 2017. No. S-16-854.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.
5. ____. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
6. ____. If a genuine issue of fact exists, summary judgment may not properly be entered.
7. **Insurance: Contracts: Proof.** The burden of establishing an effective cancellation before a loss is on the insurer.
8. **Statutes: Intent: Service of Process.** It is the intent of Neb. Rev. Stat. § 44-516 (Reissue 2010) to require registered or certified mail for every cancellation notice within its purview. The requirement of registered or certified mail facilitates proof of receipt of notice.
9. **Insurance: Notice.** There is no requirement in Neb. Rev. Stat. § 44-516 (Reissue 2010) that the insured actually receive notice.

10. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than absurd, result.
11. **Insurance: Service of Process: Notice: Legislature: Intent: Proof.** By using registered or certified services as required in Neb. Rev. Stat. § 44-516 (Reissue 2010), the Legislature relieved the insurer of proving that a notice of cancellation was received.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Reversed and remanded for further proceedings.

Daniel L. Rock and Jordan E. Holst, of Ellick, Jones, Buelt, Blazek & Longo, L.L.P., for appellant.

Jane D. Hansen for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Miller-Lerman, J.

## NATURE OF CASE

Jimmy R. Barnes, Jr., the appellant, was in a motorcycle-motor vehicle accident. American Standard Insurance Company of Wisconsin (American Standard) asserted that Barnes' motorcycle insurance policy had been canceled prior to the accident and denied underinsured coverage to Barnes. Barnes filed a complaint with a jury demand in the district court for Douglas County in which he claimed wrongful denial of coverage. The parties filed cross-motions for partial summary judgment. After a hearing, the district court granted American Standard's motion for partial summary judgment, denied Barnes' motion for partial summary judgment, and dismissed Barnes' complaint with prejudice. Barnes appeals. We reverse, and remand for further proceedings.

## STATEMENT OF FACTS

On June 7, 2013, Barnes entered into three motor vehicle insurance policies with American Standard, including

insurance policy No. 2171-0924-03, which insured a motorcycle and included underinsured motorist coverage. According to American Standard's evidence, it prepared three cancellation notices for Barnes' three motor vehicle policies on September 18, 2013, because either the bank account from which American Standard electronically withdrew Barnes' monthly premium payments had insufficient funds for the payments or the bank had rejected the transaction at the time that the premiums were due. The notices were addressed to Barnes at his mailing address and stated that the three policies would be canceled effective October 1 unless the premiums were paid. American Standard contends that it mailed Barnes' automobile insurance cancellation notices by certified mail. Barnes alleged that he did not receive the cancellation notices.

On October 10, 2013, Barnes was struck by an underinsured motorist while riding his motorcycle. Barnes sustained injuries as a result of the accident. He received $100,000 from the underinsured motorist's insurance provider. Barnes alleged that his damages were in excess of this amount, so he made a claim for underinsured motorist coverage under his American Standard motorcycle policy, which he believed was still in force at the time of the accident. American Standard contended that the policy was not in force at the time of the accident and denied the claim.

On September 16, 2015, Barnes filed his complaint with a jury demand against American Standard. He alleged that the policy covering the motorcycle was in force at the time of the accident, and he sought damages and attorney fees. On October 7, American Family filed its answer generally denying the allegations in the complaint.

American Standard filed a motion for partial summary judgment, in which it stated that it was moving for summary judgment "on the issue of whether notice of cancellation was sent by certified mail." Barnes also filed a motion for partial summary judgment, in which he stated that he was entitled to judgment as a matter of law regarding his claim for insurance

benefits. Barnes stated that he was not seeking summary judgment regarding the question of damages.

A hearing was held on April 25, 2016. At the hearing, Barnes offered and the district court received exhibits 1 through 11, which included: Barnes' affidavit; blank U.S. Postal Service forms 3811 and 3800; a copy of American Standard's mailing log on postal service form 3877 (Form 3877) dated September 18, 2013; American Standard's responses to Barnes' request for production of documents; and the cancellation notices dated September 18, 2013. American Standard offered and the district court received exhibits 12 through 20, which included: cancellation notices; two affidavits from American Standard employees regarding mailing procedures; documents regarding American Standard's policy cancellation procedure; a demonstrative envelope used to illustrate certified mail; a copy of American Standard's mailing log Form 3877 dated September 18, 2013; and a U.S. Postal Service certificate of mailing for a piece of first-class mail relating to Barnes' homeowner's policy dated September 18, 2013.

Barnes and American Standard each offered Form 3877, which indicated that three pieces of mail were sent to Barnes. Form 3877 has a space to indicate what type of service was applied to the mail, but the box for "Certified" was not checked. Form 3877 has a space where the sender is to include the addressee's information, and it states, "Addressee (*Name, Street, City, State, & ZIP Code*)." (Emphasis in original.) American Standard supplied Barnes' name, city, state, and ZIP Code on Form 3877, but it did not include his street or house number. Form 3877 contains the postmaster's stamp, date, tracking numbers, fees, and postal worker's signature.

On August 12, 2016, the district court filed its "Order on Cross-Motions for Partial Summary Judgment." The district court cited Neb. Rev. Stat. § 44-516(1) (Reissue 2010), which provides that "[n]o notice of cancellation of a policy . . . shall be effective unless mailed by registered or certified mail to the named insured . . . ." The district court noted that § 44-516

does not require American Standard to establish that Barnes received the cancellation notice; however, it requires that American Standard prove it mailed the cancellation notice to Barnes by registered or certified mail.

In its ruling, the district court noted that in the context of federal tax cases, other courts have determined that Form 3877 is an accepted method to prove that an item is sent by certified mail. The district court noted the defects in Form 3877, but nevertheless determined that the "majority of the evidence in this case establishes that [American Standard] complied with Neb. Rev. Stat. § 44-516 by sending the cancellation notice to [Barnes] via certified mail on September 18, 2013." The district court therefore granted American Standard's motion for partial summary judgment, denied Barnes' motion for partial summary judgment, and dismissed Barnes' complaint with prejudice.

Barnes appeals.

## ASSIGNMENTS OF ERROR

Barnes claims, summarized and restated, that the district court erred when it found that American Standard sent a cancellation notice to Barnes by certified mail in compliance with § 44-516 and granted American Standard's motion for partial summary judgment, denied Barnes' motion for partial summary judgment, and dismissed Barnes' complaint with prejudice when the matter was before the court on cross-motions for partial summary judgment and "discovery was leading to an alternate theory of recovery."

## STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Midland Properties v. Wells Fargo*, 296 Neb.

407, 893 N.W.2d 460 (2017). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

## ANALYSIS

The centerpiece of our analysis is § 44-516(1), which both parties agree is controlling. Section 44-516(1) provides in relevant part as follows:

> No notice of cancellation of a policy to which section 44-515 applies shall be effective unless mailed by registered or certified mail to the named insured at least thirty days prior to the effective date of cancellation, except that if cancellation is for nonpayment of premium, at least ten days' notice of cancellation accompanied by the reason therefor shall be given.

American Standard filed a motion for partial summary judgment in which it sought judgment in its favor "on the issue of whether notice of cancellation was sent by certified mail." Barnes filed a motion for partial summary judgment seeking a judgment in his favor to the effect that American Standard was liable to him on the insurance policy. Following receipt of evidence on the cross-motions for summary judgment, the district court filed its order on August 12, 2016. As noted above, the district court granted American Standard's motion for partial summary judgment, denied Barnes' motion for partial summary judgment, and dismissed Barnes' complaint with prejudice. Barnes claims that the district court's decision was error, and we agree.

The parties offered and the district court received various items of evidence at the summary judgment hearing. The evidence included Barnes' affidavit, in which he stated that he did not receive the cancellation notice by certified mail or otherwise and that at the time of the October 10, 2013, collision, he believed the policy was in full force and effect. The

evidence presented by American Standard included affidavits and documents regarding its mailing procedures; notices of cancellation addressed to Barnes; and Form 3877, also known as a Certificate of Mailing. Although not a witness to the actual mailing of the notice of cancellation, in her affidavit, a mail clerk for American Standard describes the procedure that "would" have been followed and offers her belief that the notice was sent via certified mail. Although she states that the fee on Form 3877 indicates certified service, she does not state it is consistent only with certified service. American Standard also offered a demonstrative exhibit consisting of an envelope with a certified mail label on it to illustrate the appearance of a certified mail envelope.

The parties and the court dedicate considerable attention to Form 3877 and its defects. In its decision, the district court acknowledges that American Standard failed to check the certified box and neglected to include Barnes' street address on Form 3877. The district court stated this was "problematic." The district court reasoned, however, that the defects could be overcome by American Standard's presentation of other evidence showing American Standard's ordinary mailing procedures and that other notices mailed to Barnes bore a street address.

Referring to evidence presented by American Standard, the district court stated that the corroborating American Standard employee affidavit evidence "suggests that procedures for sending certified mail were followed" and that the street address on the cancellation notices on policies not at issue in this case "creates a strong inference that the cancellation[] notices were all sent to the same address." Based on the inferences, the district court found that the "majority of the evidence in this case establishes that [American Standard] complied with Neb. Rev. Stat. § 44-516 by sending the cancellation notice to [Barnes] via certified mail on September 18, 2013." As explained below, by giving inferences favorable to American Standard, we believe the district court failed to

adhere to summary judgment standards and, therefore, its decision was error.

[3-6] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Brock v. Dunning*, 288 Neb. 909, 854 N.W.2d 275 (2014). In the summary judgment context, a fact is material only if it would affect the outcome of the case. *Id*. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Id*. If a genuine issue of fact exists, summary judgment may not properly be entered. *Id*. We apply these principles to the instant case.

As noted above, for notice of cancellation to be effective under § 44-516(1), the notice must be "mailed by registered or certified mail to the named insured." The question posed by American Standard's motion for partial summary judgment was whether the notice of cancellation was mailed by certified mail. Given the foregoing, whether American Standard fulfilled its statutory duty to mail the notice by certified mail was the central material fact raised by American Standard's motion for partial summary judgment.

[7] In a case involving an insurer's compliance with a statutory requirement of notification prior to cancellation, we stated that "the burden of establishing an effective cancellation before a loss is on the insurer." *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 679, 624 N.W.2d 636, 643 (2001). In *Daniels*, we reversed the district court's order granting summary judgment in favor of the insurer. As in *Daniels*, once the statutory notice requirement was implicated in the instant case, it was American Standard's burden to demonstrate compliance therewith in order to show that it was entitled to judgment as a matter of law. There is no actual direct evidence that the notice of cancellation was mailed certified to Barnes, and in the procedural context of a motion

for summary judgment, we believe the weight to be accorded American Standard's other evidence must await resolution at trial. See *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990).

[8] Our analysis focuses on the controlling statute, § 44-516. We have previously considered § 44-516, and we stated as follows:

> In 1972, in response to a growing national concern over arbitrary policy cancellations and nonrenewals, the Nebraska Legislature adopted a statutory scheme dealing with automobile insurance policy cancellations patterned after some model legislation proposed by certain insurance trade organizations. In 1973, it added the requirement that the cancellation notice must be mailed by registered or certified mail. . . .
>
> It is clear to us that the intent of the Legislature in the passage of these sections was to clear up confusion in the area of automobile insurance policy cancellation, not to further it. . . . We are satisfied it is the intent of section 44-516, R. R. S. 1943, to require registered or certified mail for every cancellation notice [within its purview.]
>
> The requirement of registered or certified mail facilitates proof of receipt of notice.

*Sanders v. Mittlieder*, 195 Neb. 232, 236, 237 N.W.2d 838, 840 (1976).

[9,10] As we have stated above, § 44-516(1) provides that "[n]o notice of cancellation of a policy to which section 44-515 applies shall be effective unless mailed . . . certified mail to the named insured . . . ." There is no requirement in the statute that the insured actually receive notice. In construing a statute, it is presumed that the Legislature intended a sensible, rather than absurd, result. See *In re Adoption of Chase T.*, 295 Neb. 390, 888 N.W.2d 507 (2016). The provision in this statute sets forth precisely what requirement must be satisfied in order to successfully accomplish mailing

and, hence, cancellation. Thus, where the certified box on Form 3877 is checked, proof of certified mailing is greatly enhanced. And we have only to apply the requirement to the facts at hand. Applying the plain, direct, and unambiguous language of § 44-516(1), if the notice of cancellation was mailed to Barnes by certified mail, then the cancellation would become effective in the number of days thereafter provided elsewhere in the statutes.

We considered a circumstance similar to the instant case in *Houska v. City of Wahoo, supra*, where there was an absence of direct proof of actually "sending [the particular letter] by ordinary mail" as prescribed by the relevant statute, Neb. Rev. Stat. § 76-710 (Reissue 2009). On appeal, we reversed the summary judgment entered in favor of the defendant.

The plaintiff in *Houska* contended that the absence of direct evidence of compliance with the statute completely defeated the defendant's assertion that it had complied with the statutory mailing requirement. We rejected the plaintiff's contention and instead stated that proof of compliance could be proved by alternative evidence, such as direct proof pertaining to the particular letter in question or related to the deposit of the particular letter with the U.S. Postal Service, or sufficient competent evidence demonstrating adherence to a customary mailing procedure where letters which are properly addressed and stamped are handled in a manner whereby the particular letter would have been transmitted in accordance with the statute on the particular date of the alleged mailing. We stated in *Houska* that evidence showing office custom was followed in connection with the particular letter creates an inference that the particular letter comported with the statute, but that nevertheless, compliance with the statute presented a question for the trier of fact to decide. In the instant case, Barnes had demanded a jury trial, so a jury, not the court, would be the trier of fact. In *Houska*, the record was insufficient to determine as a matter of law that the method of sending the particular letter in question comported

with § 76-710, thus creating a genuine issue of material fact preventing summary judgment. As in *Houska*, we believe that in the absence of direct proof of compliance, it is proper for the finder of fact in the instant case to consider alternative evidence when it ultimately resolves the issue of compliance with § 44-516.

As we read its order, contrary to the principles controlling resolution of summary judgment motions recited above, the district court evaluated the evidence, including alternative evidence, and resolved factual issues by taking the inferences in favor of the moving party rather than the nonmoving party. As an example, the district court found, inter alia, that the information found on the two Forms 3877 "show that three articles were sent to [Barnes] with tracking numbers indicating that the items were sent via certified mail." We believe there is no basis in this record to conclude that tracking numbers alone establish certified mail service, and in any event, it is inappropriate to infer such fact in American Standard's favor.

As the district court's order acknowledges, American Standard failed to check the certified box on Form 3877. In finding that this significant defect was overcome by American Standard's evidence, the district court relied heavily on tax cases where defects in Form 3877 are common. But we believe the district court's reliance on the tax cases was misplaced.

The primary tax case on which the district court relied in its order granting summary judgment in favor of American Standard is *Coleman v. C.I.R.*, 94 T.C. 82 (1990). That tax case is in agreement with other authorities that state that a properly and fully completed Form 3877 is preferable proof and entitles the mailer to a presumption of regularity. See *United States v. Ahrens*, 530 F.2d 781 (8th Cir. 1976). But a failure to comply with Form 3877's requirements do not merit the presumption. *Coleman v. C.I.R., supra*.

The issue in *Coleman* was whether the deficiency sought by the tax commissioner was time barred as asserted by the

taxpayers as an affirmative defense due to the allegedly tardy mailing of the tax commissioner's notice of deficiency. In the instant case, the district court cited *Coleman* and found that the defective Form 3877, combined with American Standard's corroborating habit evidence, established that the mailing to Barnes complied with the statutory requirement of certified mail. However, the lesson and application of *Coleman* is not as broad as characterized by the district court.

In *Coleman v. C.I.R., supra*, the tax court had previously denied summary judgment on the issue of timely mailing and ordered a trial on this question. *Coleman* was not a summary judgment case; instead, it was decided after trial where the disputed facts were ripe for resolution. See *Wiley v. U.S.*, 20 F.3d 222 (6th Cir. 1994) (reversing summary judgment in favor of government). Furthermore, as the opinion in *Coleman* explains, the burden of persuasion regarding the timeliness of mailing was always on the taxpayers asserting the affirmative defense that the action was barred by the statute of limitations. Therefore, although the tax commissioner's evidence of a defective Form 3877 and habit evidence carried its burden of production, ultimately, it was the taxpayers' failure to present persuasive evidence of an untimely notice that entitled the tax commissioner in *Coleman* to prevail at trial. See, similarly, *Cropper v. C.I.R.*, 826 F.3d 1280 (10th Cir. 2016) (affirming judgment in favor of government after stipulated trial).

In contrast to *Coleman v. C.I.R., supra*, the posture of the instant case must be determined by summary judgment standards, where the inferences are taken in favor of Barnes as the nonmoving party. Whereas the taxpayers in *Coleman* had the burden at trial to establish the nonoccurrence of statutory timely mailing, Barnes was not required to prove the nonoccurrence of statutorily required certified mail; instead, upon its motion for summary judgment, American Standard bore the burden to show that its notice to Barnes had met its statutory duty of a certified mailing and that it was entitled

to judgment as a matter of law. Following our review of the record, we believe that the evidence offered by American Standard did not entitle it to judgment.

We find the cases involving disputed insurance claims more helpful than the tax cases. These cases explore the significance of the terms used by the U.S. Postal Service. In *Horton v. Washington Cty. Tax Claim Bureau*, 623 Pa. 113, 81 A.3d 883 (2013), the Supreme Court of Pennsylvania explained that the types of mailing and different services added to the mailing, such as certified mail and tracking, are contained and defined in the Code of Federal Regulations as incorporated by the U.S. Postal Service's Domestic Mail Manual. See, also, 39 C.F.R. § 111.1 (2016). Form 3877 is characterized as a "'Certificate of Mailing.'" See *Horton v. Washington Cty. Tax Claim Bureau*, 623 Pa. at 126, 81 A.3d at 891. A certificate of mailing offers the sender "'evidence that you sent the item when you say you did. This official record shows the date your mail was accepted. Certificates of mailing furnish evidence of mailing only.'" *Id*. Form 3877, standing alone and without the certified box checked off, "'furnish[es] evidence of mailing only,'" see *id*.; it does not directly prove the mail had other services attached. In the district court's order on summary judgment, it referred to the Form 3877 at issue on which the certified box is not checked and Barnes' street address is missing, but did bear a tracking number. Despite the limited evidentiary weight of the Form 3877, the district court stated that "tracking numbers indicat[e] that the items were sent via certified mail." This determination tending to equate tracking numbers with certified mail is not supported by the record or the U.S. Postal Manual, and, as we noted above, further exhibits the district court's erroneous approach giving inferences to the moving party instead of the nonmoving party on summary judgment.

We find informative the reasoning in the opinion of the Supreme Court of Illinois in *Ragan v. Columbia Mut. Ins. Co.*, 183 Ill. 2d 342, 701 N.E.2d 493, 233 Ill. Dec. 643 (1998),

interpreting an insurance cancellation notification statute. The Illinois Insurance Code requires that an insurance "company shall maintain proof of mailing of such notice [of cancellation] on a recognized U.S. Post Office form or a form acceptable to the U.S. Post Office or other commercial mail delivery service." See 215 Ill. Comp. Stat. Ann. 5/143.14(a) (LexisNexis Cum. Supp. 2009). The *Ragan* decision, which granted summary judgment in favor of the insured, was quoted at length in *Hunt v. State Farm Mutual Automobile Insurance Co.*, 2013 IL App (1st) 120561, ¶ 36, 994 N.E.2d 561, 570-71, 373 Ill. Dec. 792, 801-02 (2013), as follows:

> [T]he supreme court stated "[i]t is apparent from the wording of the provision in the context of the Insurance Code that the purpose of the statute is to protect the insured from cancellation of his insurance without his knowledge. To accomplish this purpose, the legislature could have required insurance companies to prove receipt by the insured. But, by enacting this section, the legislature clearly sought to strike a balance between the interest of the insured in being informed of a cancellation of his insurance policy and the burden that would be put on an insurance company to prove receipt by the insured." [*Ragan v. Columbia Mut. Ins. Co.*, 183 Ill. 2d] at 351[, 701 N.E.2d at 497, 233 Ill. Dec. at 647]. In striking a balance between insured persons and insurers, the legislature gave insurance companies a "very low threshold of proof" relating to the mailing of cancellation notices, requiring only that the insurer show proof of mailing on a recognized United States Post Office form or form acceptable to the United States Post Office or other commercial mail delivery service. *Id.* at 351-52[, 701 N.E.2d at 497, 233 Ill. Dec. at 647]. The court then held that a finding that "the statute implicitly allows an insurance company to use other evidence to show it maintained the proof of mailing when the statute explicitly requires it to maintain such a form would disturb the

> balance that the legislature sought to achieve in enacting [section 143.14]." *Id*. at 352[, 701 N.E.2d at 497, 233 Ill. Dec. at 647].

For completeness, we note that *Hunt* approved the use of the equivalent of Form 3877 by the insurer based on the Illinois statute and a provision in the Domestic Mail Manual. *Hunt v. State Farm Mutual Automobile Insurance Co., supra.*

[11] We believe the reasoning in *Ragan v. Columbia Mut. Ins. Co., supra*, is generally relevant to our case. In § 44-516(1), the Legislature specifically selected that the notice of cancellation be mailed by "registered or certified mail." We understand that these added services are terms of art, and we believe these services were deliberately chosen by the Legislature. In this regard, we note, for comparison, that in Neb. Rev. Stat. § 44-522(4) (Reissue 2010), concerning property, marine, or liability insurance, the Legislature chose to permit notice by "first-class mail." See § 44-522(4) (providing "cancellation or nonrenewal shall be sent by registered, certified, or first-class mail to the insured's last mailing address known to the insurer"). The Legislature chose to require notice by registered or certified mail in § 44-516, but it did not choose to require proof that notice of cancellation was received. But as the court in *Hunt v. State Farm Mutual Automobile Insurance Co.* expressed, under certain statutes, insurance companies have a "'very low threshold of proof.'" 2013 IL App (1st) 120561 at ¶ 36, 994 N.E.2d at 570, 373 Ill. Dec. at 801. We agree with this observation, and given the terms chosen by the Legislature in the applicable Nebraska statute, § 44-516, we are not inclined to reduce the requirements further. For completeness, we note that we are aware that the mailing-related notice requirements in § 44-516(1) and other statutes were expanded upon, pursuant to 2017 Neb. Laws, L.B. 406, but they were not effective at the time of the underlying events in this case or at the time the district court's opinion was filed.

In sum, taking the inferences in favor of Barnes as the nonmoving party, the evidence submitted by American Standard did not establish directly that it mailed the notice of cancellation by certified mail and it was not entitled to judgment as a matter of law. The district court's order of August 12, 2016, is reversed.

## CONCLUSION

The district court's decision, which weighed the evidence and found that the "majority of the evidence . . . establishes that [American Standard] complied with Neb. Rev. Stat. § 44-516 by sending the cancellation notice to [Barnes] via certified mail," was not warranted in the procedural context of a motion for summary judgment. Accordingly, we reverse the order of the district court which granted American Standard's motion for partial summary judgment, denied Barnes' motion for partial summary judgment, and dismissed Barnes' complaint with prejudice. The cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

Stacy, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# J.S., appellant, v. Grand Island Public Schools, appellee.

899 N.W.2d 893

Filed July 28, 2017. No. S-16-875.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
6. **Jurisdiction: Service of Process: Parties.** The voluntary appearance of a party is equivalent to service of process for purposes of personal jurisdiction.
7. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
8. ____: ____. Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.

9. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
10. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
11. ____: ____. A court action taken without subject matter jurisdiction is void.
12. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
13. **Appeal and Error.** The right of appeal in Nebraska is purely statutory.
14. **Statutes: Appeal and Error.** Unless a statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist.
15. **Jurisdiction: Statutes: Appeal and Error.** The requirements of a statute underlying a right to appeal are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.
16. **Actions: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
17. **Administrative Law: Schools and School Districts: Appeal and Error.** Appeals from the district court under the Student Discipline Act are governed by the Administrative Procedure Act.
18. **Administrative Law: Jurisdiction: Appeal and Error.** The filing of the petition and the service of summons are the two actions necessary to establish the jurisdiction of the district court to review the final decision of an administrative agency under the Administrative Procedure Act.

Appeal from the District Court for Hall County: Teresa K. Luther, Judge. Appeal dismissed.

Mitchell C. Stehlik, of Lauritsen, Brownell, Brostrom & Stehlik, P.C., L.L.O., for appellant.

Jeanelle R. Lust and Paul B. Donahue, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## NATURE OF CASE

This case concerns a 15-day suspension of a student for a post made on a social media website from her home that, in part, caused a substantial disruption at her school. The superintendent and the school board each upheld the suspension. On appeal under the Student Discipline Act, Neb. Rev. Stat. § 79-254 et seq. (Reissue 2014), the Hall County District Court affirmed, finding the suspension did not exceed the authority provided by §§ 79-264 and 79-267.

## BACKGROUND

On Sunday, April 3, 2016, a group of students from Barr Middle School (Barr), which is part of the Grand Island Public Schools (GIPS), were communicating on a social media website. A post was made anonymously: "Tomorrow gonna be hella fire [fire emoji] be there (School)." This post was followed by another anonymous post: "Don't show up to school tomorrow [gun emoji]." That evening, the Barr administration was notified by the Grand Island Police Department of these anonymous postings.

The following morning, April 4, 2016, extra security was present at the school and the police and Barr staff searched the school for any potential threats. During the morning, the school received over 100 telephone calls from parents concerned about safety. That day, 17 students were checked out of school and 4 of them remained checked out on April 5.

Police and Barr staff conducted interviews of students to identify who had made the anonymous postings. J.S., a student at Barr, was one of the students interviewed. During her interview, she admitted to making the "hella fire" post. The post with the gun emoji was not made by J.S., and no evidence was uncovered that she had any connection with the

second post. Barr's principal sent J.S. home and suspended her for 15 days.

J.S. requested an administrative hearing to contest her removal, which hearing was held on April 14, 2016.

At the administrative hearing, Barr's principal testified that when he talked with J.S. and her parents on April 4, 2016, she stated that she did not know why she made the post or could not explain it to them. He also stated that J.S.' social media posting was the sole reason for her removal from school and that at the time of J.S.' removal, there were no further threats to the safety of other students by her.

J.S. testified that on Sunday evening, April 3, 2016, she was at home using her cell phone to communicate with other students on a social media website. The context of the discussion, when she made her post, was about skipping school the next day. She explained that "hella fire" means "good" or "cool." Accordingly, she stated that her post was a sarcastic statement that school would be good or cool the next day and that the other students should be there.

After the administrative hearing, the superintendent of GIPS upheld J.S.' suspension. J.S. next appealed to the GIPS board of education (Board). In May 2016, the Board held a hearing and also upheld the suspension.

J.S. timely filed a petition with the district court to appeal the Board's decision. After the filing of the petition, the Board filed a voluntary appearance, under Neb. Rev. Stat. § 25-516.01 (Reissue 2016). Specifically, the voluntary appearance stated, "[GIPS] acknowledges receipt of the [petition], enters its Voluntary Appearance . . . , and waives service of Summons pursuant to Neb.Rev.Stat. § 79-289." The record does not show that the Board was ever served with a copy of the petition.

After a hearing, the court affirmed J.S.' 15-day suspension, stating that it did not exceed the authority provided by §§ 79-264 and 79-267. The court reasoned that J.S.' posting was open to several interpretations, including one of violence,

and that it in fact prompted a posting that could also be considered threatening or violent. Therefore, it found that "[J.S.'] posting on social media set in motion a series of events that cause[d] substantial disruption to the school environment." J.S. appealed.

## ASSIGNMENT OF ERROR

J.S. assigns, restated, that the district court erred in affirming her suspension.

## STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[1]

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[2]

[3,4] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act (APA) may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[3] When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

## ANALYSIS

[5] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine

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[1] *Medicine Creek v. Middle Republican NRD*, 296 Neb. 1, 892 N.W.2d 74 (2017).

[2] *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017).

[3] *Medicine Creek, supra* note 1.

[4] *Id.*

whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[5]

On appeal, a show cause order was issued ordering the parties to provide authority to the court showing that the district court obtained subject matter jurisdiction over the matter under § 79-289. GIPS argues that the district court lacked subject matter jurisdiction because a party cannot voluntarily confer subject matter jurisdiction on a court,[6] while J.S. asserts that the Legislature allows courts to acquire subject matter jurisdiction over a party by its compliance with § 25-516.01. Further, J.S. contends that GIPS' voluntary appearance waived summons and acknowledged that it had obtained a copy of the petition, so § 79-289 was satisfied.

[6,7] To support her contention, J.S. points us to § 25-516.01(1), which states that "[t]he voluntary appearance of the party is equivalent to service." However, we have held that the voluntary appearance of a party is equivalent to service of process for purposes of *personal jurisdiction*.[7] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.[8]

[8-11] Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.[9] Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or

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[5] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[6] *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997).

[7] *Burns v. Burns*, 293 Neb. 633, 879 N.W.2d 375 (2016).

[8] *Abdouch v. Lopez*, 285 Neb. 718, 829 N.W.2d 662 (2013).

[9] *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016).

conduct of the parties.[10] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[11] A court action taken without subject matter jurisdiction is void.[12]

Section 79-289(1) sets forth that proceedings for review under the Student Discipline Act pursuant to §§ 79-288 to 79-292 shall be instituted by filing a petition in the district court of the county where the action is taken within 30 days after the service of the final decisions by the school board or board of education under §§ 79-286 and 79-287. Further, § 79-289(3) requires that "[s]ummons shall be served as in other actions, except that *a copy of the petition shall be served upon the board together with the summons*." (Emphasis supplied.)

[12] We have held that in construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[13]

[13-16] The right of appeal in Nebraska is purely statutory.[14] Unless a statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist.[15] The requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.[16] Where a district court has statutory authority to review an action, the district court may

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Concordia Teachers College, supra* note 6.

[14] *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

[15] *Gage Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 260 Neb. 750, 619 N.W.2d 451 (2000).

[16] *Boone Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 9 Neb. App. 298, 611 N.W.2d 119 (2000).

acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.[17]

[17,18] Appeals from the district court under the Student Discipline Act are governed by the APA.[18] The filing of the petition and the service of summons are the two actions necessary to establish the jurisdiction of the district court to review the final decision of an administrative agency under the APA.[19]

In *Concordia Teachers College v. Neb. Dept. of Labor*,[20] we considered an appeal under the APA. In doing so, we reviewed the language of Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1994), which provided in pertinent part:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. . . . Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.

We held that in giving the statute its plain, ordinary, and popular sense, it was apparent that the Legislature intended that a summons be served within 30 days of the filing of the petition for review as a prerequisite to the exercise by the district court of its jurisdiction over the subject matter on an appeal from an adverse decision of an administrative agency.[21]

The record indicated that the appellant in *Concordia Teachers College* filed an amended petition, but failed to

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[17] See, *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012); *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997).

[18] *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013).

[19] *Essman, supra* note 17.

[20] *Concordia Teachers College, supra* note 6.

[21] *Id.*

serve the summons within 30 days and served it on the wrong entity. We determined that the appellant failed to invoke the subject matter jurisdiction of the district court.[22] As a result, the district court did not acquire authority to review a labor commissioner's ruling under the APA.[23]

Similarly, in the instant case, the record indicates that J.S. timely filed her petition with the district court. However, she failed to serve a summons and a copy of the petition upon the Board. As a result, only one of the two actions required by § 79-289 was accomplished. J.S.' failure to comply with the statutory requirements prevented the district court from obtaining subject matter jurisdiction, and as a result, its decision was void.

## CONCLUSION

J.S. failed to seek district court review in the mode and manner provided by statute. By failing to serve the summons and a copy of the petition upon the Board, she failed to timely petition for review. The district court lacked subject matter jurisdiction under the Student Discipline Act. We likewise lack subject matter jurisdiction, and we dismiss J.S.' appeal for lack of jurisdiction.

Appeal dismissed.

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[22] *Id.*

[23] *Id.*




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Frohberg Electric Company, Inc., a Nebraska corporation, appellee, v. Grossenburg Implement, Inc., a Nebraska corporation, and Kiehm Construction, Inc., a Minnesota corporation, appellants.

900 N.W.2d 32

Filed July 28, 2017. No. S-16-987.

1. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
2. **Arbitration and Award.** Arbitrability presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
4. **Arbitration and Award: Contracts: Appeal and Error.** Where an issue concerns the formation or existence of an arbitration agreement and not its validity, enforceability, or scope, an appellate court applies state law.
5. **Arbitration and Award: Federal Acts: Contracts.** The Federal Arbitration Act's application is triggered only if a contract involving interstate commerce actually contains an arbitration clause.
6. **Arbitration and Award: Federal Acts: Contracts: States.** In a contract involving interstate commerce, the equal-treatment principle of the Federal Arbitration Act applies in determining whether a valid arbitration agreement exists: States may not apply a state rule discriminating against arbitration and are required to place arbitration agreements on equal footing with all other contracts.
7. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
8. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
9. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

10. **Arbitration and Award: Federal Acts: Contracts.** If a contract containing an arbitration clause involves interstate commerce, the Federal Arbitration Act governs the contract.
11. **Contracts: States: Words and Phrases.** Contracts involving interstate commerce include contracts for services between parties of different states.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Wayne County: James G. Kube, Judge. Reversed and remanded with directions.

Timothy Engler, of Rembolt Ludtke, L.L.P., for appellants.

David E. Copple and Michelle M. Schlecht, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

## INTRODUCTION

This is an appeal from an order denying a motion to compel arbitration of a construction dispute. A subcontractor sued the project's owner and general contractor, which in turn sought to compel arbitration. The appeal turns on whether the subcontract effectively incorporated a mandatory arbitration clause from the general contract, thereby mandating the subcontractor to arbitrate. Because we conclude that it did, we reverse, and remand with directions.

## BACKGROUND

### Parties and Governing Contracts

Grossenburg Implement, Inc. (Owner), a Nebraska corporation, executed a standard form contract (the general

contract) with Kiehm Construction, Inc. (Contractor), a Minnesota corporation, for the construction of several structures on Owner's property in Wayne County, Nebraska. The general contract included a mandatory arbitration clause for "any Claim . . . not resolved by mediation pursuant to [the general conditions]."

Contractor then subcontracted with Frohberg Electric Company, Inc. (Subcontractor), a Nebraska corporation, to provide electrical services and materials in constructing the structures. The subcontract referenced the existence of the general contract and stated, "Contractor has made available to . . . Subcontractor all of the above documents, and . . . the above have been carefully examined by . . . Subcontractor."

The general contract was also referenced in several sections of the subcontract, including one (Section 11) in which Subcontractor agreed "[t]o be bound to . . . Contractor by the terms of the General Contract" and "to conform to and to comply with the provisions of the General Contract." Another section (Section E), under the heading "The Contractor Agrees as Follows," provided: "If arbitration of disputes is provided for in the General Contract, any dispute arising between . . . Contractor and . . . Subcontractor under this Subcontract, including the breach thereof, shall be settled by arbitration in the manner provided for in the General Contract."

## Lower Court Proceedings

After Subcontractor provided services pursuant to the subcontract, a dispute arose concerning the payment owed to Subcontractor. Subcontractor then obtained a construction lien against Owner's property and later filed a complaint against Owner and Contractor to obtain a judgment and foreclose on the construction lien.

Owner and Contractor jointly moved to dismiss the complaint or, in the alternative, to compel arbitration pursuant to the terms of the subcontract and the general contract. They

alleged that the subcontract included specific provisions in Section 11 and Section E which incorporated the alternative dispute resolution clauses from the general contract and general conditions signed by Owner and Contractor. Thus, they argued that the matter should be settled by arbitration as provided in those documents.

The district court overruled the motion and specifically held that the terms of the subcontract did not bind Subcontractor to the dispute resolution provisions of the general contract or general conditions. The court noted that the only provision specifically purporting to bind the parties to alternative dispute resolution was under the subcontract section titled "The Contractor Agrees as Follows" and not contained within the other sections, "The Subcontractor Agrees as Follows" or "The Contractors and Subcontractors Agree as Follows." Accordingly, the court found that Subcontractor did not agree to that provision by the express terms of the subcontract.

The court also found that the provision of Section 11 in which Subcontractor agreed "[t]o be bound to . . . Contractor by the terms of the General Contract" was vague as to whether it applied to disputes between Subcontractor and Owner or between Subcontractor and Contractor. Since the general contract spoke only to disputes between Owner and Contractor, the court found that the general contract language was inconsistent with the subcontract and that the language of the subcontract should govern. Because it had already determined that the express terms of the subcontract did not bind Subcontractor to the dispute resolution process within the general contract, the court concluded that there was no arbitration agreement.

Owner and Contractor appealed, and we moved the case to our docket.[1]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

## ASSIGNMENTS OF ERROR

Owner and Contractor assign, reordered, restated, and combined, that the district court erred in (1) construing the subcontract and the general contract incorporated by reference and (2) denying their motion to compel arbitration and stay the action pending arbitration.

## STANDARD OF REVIEW

[1-3] The meaning of a contract and whether a contract is ambiguous are questions of law.[2] Likewise, arbitrability presents a question of law.[3] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[4]

## ANALYSIS

Owner and Contractor advance two main arguments on appeal. They argue that the subcontract incorporated the dispute resolution process outlined in the general contract and general conditions with clear and unambiguous language set forth in both Section E and Section 11 of the subcontract. They also argue that the Federal Arbitration Act (FAA)[5] applied to the subcontract and general contract and that under the express provisions of the FAA, their motion to compel arbitration should have been sustained.

[4-6] We first address whether the subcontract unambiguously incorporated the terms of the general contract such that the claims in the instant case were subject to a binding arbitration clause. Because this issue concerns the formation

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[2] *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 868 N.W.2d 67 (2015).

[3] *Wilczewski v. Charter West Nat. Bank*, 295 Neb. 254, 889 N.W.2d 63 (2016).

[4] *Id.*

[5] 9 U.S.C. § 1 et seq. (2012).

or existence of an arbitration agreement and not its validity, enforceability, or scope, we apply state law.[6] The FAA's application is triggered only if a contract involving interstate commerce actually contains an arbitration clause.[7] But, the FAA's equal-treatment principle applies in determining whether a *valid* arbitration agreement exists: States may not apply a state rule discriminating against arbitration and are required to place arbitration agreements on equal footing with all other contracts.[8]

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[6] See *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 860 N.W.2d 391 (2015). See, also, *Southland Corp. v. Keating*, 465 U.S. 1, 19-20, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (noting "lower courts generally look to state law regarding questions of formation of the arbitration agreement under [9 U.S.C.] § 2 [(1976)], . . . which is entirely appropriate so long as the state rule does not conflict with the policy of § 2") (citations omitted); *Washington Mut. Finance Group, LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004) (holding "in determining whether the parties agreed to arbitrate a certain matter, courts apply the contract law of the particular state that governs the agreement"); *ISC Holding AG v. Nobel Biocare Investments N.V.*, 351 Fed. Appx. 480 (2d Cir. 2009) (applying state contract law where contract was ambiguous as to whether agreement to arbitrate existed).

[7] See *id.* See, also, *CardioNet, Inc. v. CIGNA Health Corp.*, 751 F.3d 165, 173 (3d Cir. 2014) ("while the FAA 'embodies a strong federal policy in favor of arbitration, . . . the duty to arbitrate remains one assumed by contract.' . . . Thus, the presumption of arbitrability applies only where an arbitration agreement is ambiguous about whether it covers the dispute at hand. . . . Otherwise, the plain language of the contract controls") (citations omitted); *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1116 (11th Cir. 2014) (determining that presumption of arbitrability does not apply "before it is determined whether there is a 'validly formed and enforceable arbitration agreement'"); *Paul Revere Variable Annuity Ins. v. Kirschhofer*, 226 F.3d 15 (1st Cir. 2000) (determining that federal preference for arbitration does not come into play where right to arbitrate is unclear or ambiguous).

[8] See *Kindred Nursing Centers L. P. v. Clark*, 581 U.S. 246, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017).

[7,8] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[9] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[10]

## Section E

Owner and Contractor argue that the district court improperly focused on the assigned headings of the subcontract when it construed Section E as agreed to only by Contractor. Owner and Contractor allege that Section E unambiguously incorporated the dispute resolution process provided for in the general contract and that it was binding upon both Contractor and Subcontractor. We agree.

As stated above, Section E provided, "If arbitration of disputes is provided for in the General Contract, any dispute arising between . . . Contractor and . . . Subcontractor under this Subcontract, including the breach thereof, shall be settled by arbitration in the manner provided for in the General Contract." But, because the provision was included under the section heading "The Contractor Agrees as Follows" and not under either the heading "The Subcontractor Agrees as Follows" or the heading "The Contractors and Subcontractors Agree as Follows," the district court determined that *Subcontractor's* claims were not subject to arbitration. By purportedly enforcing the express terms of the contract, the court concluded that Section E was binding on Contractor only. In doing so, the district court adopted a restrictive interpretation of the section.

[9] While two conflicting interpretations of Section E can be advanced, only one of them is reasonable. The district court's restrictive interpretation disregards Section E's broad language and effectively rewrites the section by limiting its

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[9] *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist., supra* note 2.

[10] *Id.*

applicability to those disputes complained of by Contractor and not Subcontractor. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two *reasonable* but conflicting interpretations or meanings.[11] Because the restrictive interpretation of Section E was unreasonable, Section E was unambiguous and should have been enforced by its express terms.

Consequently, both Contractor and Subcontractor agreed to Section E despite the section heading. For two reasons, we read that heading as suggesting a *mutual promise* rather than a unilateral commitment. First, the plain meaning of the term "agrees" contemplates a mutual understanding with another.[12] And because Subcontractor was the only other party to the subcontract, it was the only one with which Contractor could agree. Second, because other provisions under the same heading, including an integration clause, are ones that are clearly intended to apply to both parties, the heading implicitly declares that "Contractor Agrees" *with* Subcontractor.

Even under the heading "The Contractor Agrees as Follows," the express terms of Section E included a reciprocal agreement to arbitrate all disputes between Contractor and Subcontractor arising from the subcontract pursuant to the terms of the general contract. Because Subcontractor's claims arose from the subcontract, they were subject to this agreement.

### Incorporated Arbitration Agreement

Section E expressly provided for the settlement of disputes between Contractor and Subcontractor by "arbitration *in the*

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[11] *Id.*

[12] "Agree," Oxford English Dictionary Online, http://www.oed.com/view/Entry/4146 (last visited July 20, 2017) (defining term as "[t]o accede, consent; to come to an agreement with another").

*manner provided* for in the General Contract." Therefore, we must clarify what the general contract provides regarding the "manner" of arbitration.

The general contract provides, "For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of [the general conditions], the method of binding dispute resolution shall be . . . Arbitration pursuant to Section 15.4 of [the general conditions]." And, § 15.3.1 of the general conditions provides, "Claims, disputes, or other matters in controversy arising out of or related to the Contract except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6 shall be subject to mediation as a condition precedent to binding dispute resolution." Thus, a claim must be subject to mediation and the mediation of the dispute must be unsuccessful before the claim is subject to binding arbitration.

The sweeping language of § 15.3.1 subjects all claims arising out of the contract, except those waived pursuant to the general conditions, to mediation as a condition precedent to binding dispute resolution. Section 9.10.4 waived certain claims by Owner after it made final payment. Section 9.10.5 similarly waived those claims by Contractor and subcontractors after their acceptance of final payment. Finally, Section 15.1.6 waived all claims for consequential damages.

Here, Owner did not make a final payment and, necessarily, Subcontractor did not accept a final payment. Subcontractor's claims arose out of a perceived breach of the contract, and Subcontractor did not seek consequential damages. Therefore, Subcontractor's claims did not fall within one of the categories of claims waiving mediation pursuant to the general conditions. Because Subcontractor's claims all arose out of the contract, the claims were subject to the dispute resolution process mandated by § 15.3.1.

Applicability of FAA

[10] If a contract containing an arbitration clause involves interstate commerce, the FAA governs the contract.[13] We have already determined that the subcontract unambiguously incorporated the arbitration agreement, with its requirement for mediation as a condition precedent, from the general contract and general conditions. Accordingly, we now consider whether the subcontract involved interstate commerce, thereby triggering the applicability of the FAA.

[11] Contracts involving interstate commerce include contracts for services between parties of different states.[14] Here, the subcontract undeniably met this definition. The subcontract was for the provision and installation of electrical services and materials in the buildings constructed pursuant to the general contract. Thus, it was a contract for services. And it was clearly between parties of different states: Contractor is a Minnesota corporation, and Subcontractor is a Nebraska corporation. Therefore, the FAA applied and the agreement is presumed valid, irrevocable, and enforceable.[15]

Because the subcontract's arbitration clause is governed by the FAA, the action should have been stayed until arbitration was had in accordance with the terms of the agreement.[16] Section 15.3.1 mandated mediation as a condition precedent to binding arbitration. At oral argument, it was conceded that mediation had not been attempted. Therefore, we must reverse the district court's decision and remand the cause with directions that the court enter an order compelling arbitration in the manner provided for in the general contract. That is, the parties must attempt to resolve their dispute in mediation and then

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[13] *David Fiala, Ltd. v. Harrison, supra* note 6.

[14] *Id.*

[15] See 9 U.S.C. § 2 (2012).

[16] See 9 U.S.C. § 3 (2012).

submit their dispute to arbitration in the event that mediation is unsuccessful.

[12] Having found reversible error, we do not address Owner and Contractor's remaining arguments. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[17]

## CONCLUSION

Because the subcontract included a mutually agreed-to arbitration clause governed by the FAA and Subcontractor's claims were subject to the clause, we conclude that the motion to compel arbitration in the manner provided for in the general contract should have been sustained. In other words, the parties should have been required to attempt mediation and, if that failed, to proceed to arbitration. We reverse the district court's order and remand the cause with directions that the court enter an order staying the action and compelling arbitration pursuant to the agreement.

Reversed and remanded with directions.

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[17] *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Anthony L. Burries, appellant.

900 N.W.2d 483

Filed August 4, 2017. No. S-15-1008.

1. **Appeal and Error.** An appellate court independently decides questions of law presented on appeal.
2. **Constitutional Law: Self-Incrimination: Appeal and Error.** Whether a defendant voluntarily made a statement while in custody and whether a defendant unambiguously invoked his or her right to remain silent or to have counsel present are mixed questions of law and fact. An appellate court reviews a trial court's finding of historical facts for clear error and independently determines whether those facts satisfy the constitutional standards.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
5. ____: ____. An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on relevance, whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, and the sufficiency of a party's foundation for admitting evidence.
6. **Rules of Evidence: Other Acts.** An appellate court reviews for abuse of discretion a trial court's evidentiary rulings on the admissibility of a defendant's other crimes or bad acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), or under the inextricably intertwined exception to the rule.
7. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or

unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

8. **Rules of Evidence: Appeal and Error.** When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of a proponent's evidence is a question of law, subject to de novo review.
9. **Rules of Evidence: Hearsay.** Hearsay is not admissible except as provided by the Nebraska Evidence Rules.
10. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.
11. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement.
12. **Effectiveness of Counsel: Appeal and Error.** An appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.
13. **Constitutional Law: Miranda Rights.** The warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), are an absolute prerequisite to interrogation and fundamental with respect to the Fifth Amendment privilege.
14. **Miranda Rights: Waiver: Proof.** If a defendant seeks suppression of a statement because of an alleged violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the State must prove that the defendant validly waived his or her *Miranda* rights by a preponderance of the evidence.
15. **Miranda Rights: Waiver: Appeal and Error.** An appellate court looks to the totality of the circumstances to determine whether a defendant validly waived his or her rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A valid waiver must be made knowingly and voluntarily, in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct.

16. **Miranda Rights: Police Officers and Sheriffs.** Law enforcement officers are not required to rewarn suspects from time to time of their rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.
17. **Miranda Rights.** The precise advisement language set out in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is not mandatory.
18. **Right to Counsel: Waiver.** The key inquiry in determining whether a defendant waived his or her right to counsel during an interrogation is whether the defendant was made sufficiently aware of his or her right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel.
19. **Self-Incrimination: Right to Counsel: Waiver: Proof.** Although an express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of the waiver, it is not dispositive.
20. **Effectiveness of Counsel.** A defense counsel is not ineffective for failing to raise an argument that has no merit.
21. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
22. **Effectiveness of Counsel: Proof.** To show prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
23. **DNA Testing: Evidence.** The relevance of DNA evidence depends on its tendency to include or exclude an individual as the source of a biological sample.
24. **Expert Witnesses.** A court should exclude an expert's opinion when it gives rise to two conflicting inferences of equal probability, so the choice between them is a matter of conjecture.
25. **Rules of Evidence: Expert Witnesses: DNA Testing.** A DNA expert's testimony that there may have been a minor contributor's DNA in a biological sample is irrelevant evidence because it is not probative of the source of the DNA.

26. **Trial: DNA Testing: Evidence.** A DNA expert's inconclusive results that a defendant cannot be excluded as a minor contributor to a biological sample allows the jury to speculate that the defendant might have been the minor contributor when the expert fails to provide any statistical relevance for the detected alleles in relationship to the defendant's DNA profile.
27. ____: ____: ____. The value of inconclusive DNA testing results is substantially outweighed by the danger that the evidence will mislead the jurors absent statistical evidence that will help them to assess whether a defendant is or is not the source of DNA found in a biological sample.
28. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant's appellate counsel is not the defendant's trial counsel, the defendant must raise on direct appeal any claim that the trial counsel provided ineffective assistance, if the issue is known to the defendant or apparent from the record, in order to avoid a procedural bar to raising the claim later in a postconviction proceeding.
29. **Effectiveness of Counsel: Proof: Appeal and Error.** An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by a trial counsel when raising an ineffective assistance claim on direct appeal.
30. **Trial: Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.
31. **Effectiveness of Counsel: Records: Appeal and Error.** An appellate court will address a claim on direct appeal that a defendant's trial counsel was ineffective only if the record is sufficient to adequately review the question.
32. **Rules of Evidence: Other Acts.** The list of permissible purposes under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), is not exhaustive.
33. ____: ____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime.
34. ____: ____. Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.

35. **Homicide: Rules of Evidence: Other Acts: Time.** Evidence of a murder defendant's previous threat to the victim or statement to others showing a desire to harm or kill the victim are facts that are inextricably intertwined with the charged murder if the defendant made the threat or statement fairly close in time to the murder.
36. **Criminal Law: Witnesses.** A defendant's attempted intimidation or intimidation of a State's witness is evidence of the defendant's conscious guilt that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crime charged.
37. **Rules of Evidence: Other Acts: Proof.** Pursuant to Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Reissue 2016), before the prosecution can offer evidence of a criminal defendant's extrinsic acts under rule 404(2), it must first prove to the trial court, by clear and convincing evidence and outside the jury's presence, that the defendant committed the act.
38. ____: ____: ____. Upon objection to evidence offered under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), the proponent must state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court must similarly state the purpose or purposes for which it is receiving the evidence. A trial court must then consider whether the evidence is independently relevant, which means that its relevance does not depend upon its tendency to show propensity.
39. **Rules of Evidence: Other Acts.** Evidence offered under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), is subject to the overriding protection of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), which requires a trial court to consider whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.
40. **Trial: Rules of Evidence: Other Acts: Juries.** When requested, the trial court must instruct the jury on the specific purpose or purposes for which it is admitting the extrinsic acts evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), to focus the jurors' attention on that purpose and ensure that it does not consider it for an improper purpose.
41. **Trial: Rules of Evidence: Other Acts: Appeal and Error.** A proponent's clear explanation for evidence offered under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), ensures that a trial court has an opportunity to examine the evidence for its independent relevance and the potential for unfair prejudice. The requirement that the trial court state on the record the purpose or purposes for which such evidence is received is primarily to ensure that an appellate court can review the trial court's ruling.

42. **Rules of Evidence: Proof.** Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2016), requires authentication or identification of evidence sufficient to support a finding that a matter is what the proponent claims as a condition precedent for admission.
43. ____: ____. Authentication or identification under Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2016), is not a high hurdle. A proponent is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity. If the evidence is sufficient to support a finding that the evidence is what it purports to be, the rule is satisfied.
44. **Circumstantial Evidence.** The identity of a participant in a telephone conversation may be established by circumstantial evidence such as the circumstances preceding or following the telephone conversation.
45. **Hearsay: Words and Phrases.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.
46. **Hearsay.** A declarant's out-of-court statement offered for the truth of the matter asserted is inadmissible unless it falls within a definitional exclusion or statutory exception.
47. **Rules of Evidence: Hearsay.** The hearsay exception under Neb. Evid. R. 803(1), Neb. Rev. Stat. § 27-803(1) (Reissue 2016), for a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," comprises excited utterances.
48. ____: ____. Excited utterances are an exception to the hearsay rule, because the spontaneity of excited utterances reduces the risk of inaccuracies inasmuch as the statements are not the result of a declarant's conscious effort to make them. The justification for the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity for reflection and produces utterances free of conscious fabrication.
49. **Rules of Evidence: Hearsay: Proof.** For a statement to be an excited utterance, the following criteria must be met: (1) There must be a startling event, (2) the statement must relate to the event, and (3) the declarant must have made the statement while under the stress of the event.
50. **Rules of Evidence: Hearsay: Time.** An excited utterance may be subsequent to the startling event if there was not time for the exciting influence to lose its sway. The true test for an excited utterance is not when the exclamation was made, but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.
51. **Rules of Evidence: Hearsay: Police Officers and Sheriffs.** The period in which the excited utterance exception applies depends on the facts

of the case. Relevant facts include the declarant's physical conditions or manifestation of stress and whether the declarant spoke in response to questioning. But a declarant's response to questioning, other than questioning from a law enforcement officer, may still be an excited utterance if the context shows that the declarant made the statement without conscious reflection.

52. **Pretrial Procedure: Evidence: Juries.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.
53. **Trial: Pretrial Procedure: Evidence: Appeal and Error.** When a motion in limine to exclude evidence is overruled, to preserve error for appeal, the movant must renew the objection when the particular evidence which was sought to be excluded by the motion is offered during trial.
54. **Criminal Law: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the error was harmless beyond a reasonable doubt.
55. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.
56. **Trial: Evidence.** The erroneous admission of evidence is generally harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

Michael J. Wilson and Glenn Shapiro, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

A jury found the appellant, Anthony L. Burries, guilty of premeditated first degree murder for killing his girlfriend, Tina

Hoult. The court sentenced him to life imprisonment. This is Burries' direct appeal.

## II. BACKGROUND

### 1. Evidence of Crime

Hoult lived alone in a southwest Omaha apartment. After she failed to report for her scheduled work shifts on Friday and Saturday, May 16 and 17, 2014, her employer contacted law enforcement. On Sunday morning, May 18, police officers went to her apartment to check on her. A neighbor identified Hoult's car in the parking lot and told the officers that he had not seen Hoult in about 2 days. When she did not respond to knocks at her door, the maintenance manager unlocked the deadbolt to her apartment for the officers. None of the apartment doors had locks on the doorknobs. The deadbolts could only be locked from the inside or by someone using a key from the outside.

The officers found Hoult's body slumped over in a chair with multiple gashes in her skull. She was deceased. They saw blood on the chair, splattered on the walls, and pooled on the floor below her head. Her apartment had no signs of a forced entry or a struggle. No weapons were found in the apartment that could have inflicted Hoult's injuries.

An autopsy revealed that Hoult died from at least nine blows to her head from a heavy instrument with a sharp edge. She had died at least several hours before she was found, but the pathologist could not determine the time or date of her death.

Steffanie Beck was a long-time friend of Hoult who testified that Burries had been Hoult's boyfriend, on and off, for 11 to 12 years before her death. He was also romantically involved with Harmony Howard, who was the mother of his son.

Howard learned about Burries' relationship with Hoult when Burries was arrested in December 2012 for assaulting Hoult. After he was arrested for the assault, he called Howard to tell her that her car, which he had borrowed, was in the parking

lot of Hoult's apartment complex. One of Burries' roommates drove Howard there to get it. As a result, Howard knew the location of the complex where Hoult lived, but she did not know which apartment was Hoult's.

At Burries' trial, the State submitted cell phone records showing text messages that Hoult and Burries exchanged from late Tuesday, May 13, 2014, until the early morning of Friday, May 16. A little before midnight on Tuesday, Burries began texting Hoult stating that he wanted to come to her apartment. Hoult responded that he should stay where he was and expressed dissatisfaction with their relationship. Burries' texts expressed his frustration with Hoult. This texting stopped at about 1:45 a.m. on Wednesday.

On Wednesday evening, May 14, 2014, Howard drove Burries to a bar close to Hoult's apartment where Hoult and other residents at the apartment complex would often socialize. When Burries returned after 10 to 15 minutes, Howard said he seemed agitated and she drove him home. Late Wednesday night, Burries began texting Hoult again. She responded that her cell phone was not working properly and that she was going to bed.

On Thursday, May 15, 2014, beginning about 6 a.m., Burries texted Hoult multiple times that he was coming over for sex. Hoult repeatedly responded that she was not interested and to leave her alone. He accused her of being with other men and lying about being at work. She responded that she was tired of him trying to control her and threatening her. She specifically stated that he should not have threatened to torture her or say that she "owe[d him] a limb." She wrote that she did not feel safe around him. Burries responded that she had caused his conduct by being disrespectful: "[L]ook at everything you've been doing lately just disrespect after another. All intentional and you think i'm not going to be mad. . . . You caused all of this and you ain't getting away with it. . . . You lucky I haven't fucked you up fur all this shit." When he said he could easily come to her apartment, she responded that she did not want

him to; she wanted him to leave her alone. The text messages stopped Thursday morning.

Around 10:30 or 11 p.m. on Thursday, May 15, 2014, Burries called Howard to borrow her car. She went and picked him up, and he dropped her off at her house before going to a bar. She said that he was wearing a striped shirt over a black tank top, jeans, and white athletic shoes.

About 11:30 p.m. on Thursday, Hoult went to visit Adrian Hogan, who was a resident at Hoult's apartment complex. Hogan said that Hoult left his apartment about 1:30 a.m. on Friday.

At about 3:20 a.m. on Friday, May 16, 2014, Burries texted Hoult that he needed to see her and that he knew she was home. At 3:25 a.m., he sent another text message that if her cell phone was not working, he would just show up. Hoult opened these messages but did not respond.

Howard came to Burries' house about 3:30 a.m. on Friday. When she arrived, Burries approached her car in his driveway and told Howard to take him to the intersection that was close to Hoult's apartment complex. Howard said she was frightened by a look Burries gets in his eyes: "[I]t's like a blank look. It's almost like looking in the eyes of the devil." She drove him to the requested intersection.

When they got to the intersection, Burries told Howard that he needed to talk to Hoult. Howard drove to Hoult's apartment complex, and Burries directed her to Hoult's apartment. She waited in her car for 2 to 5 minutes while Burries went inside. She estimated that she dropped Burries off at Hoult's apartment between 3:30 to 4 a.m. Cell phone records showed that at 3:34 a.m., Hoult received two text messages from Burries and that she opened them. At 3:40 a.m., Hoult texted Burries that he should be sleeping. That was the last text message she sent. Burries' cell phone did not receive this message until 5:54 a.m.

When Burries returned to Howard's car, he told her to "'[d]rive,'" in an "[a]ngry, firm" tone. Howard said that she

was afraid because he was yelling at her not to look at him and not to pull up next to anyone. She did not see anything in his hands, but she believed that the car's dome light was off. She said that he had grabbed his cream-colored coat from the back seat and laid the coat over his lap.

Burries had Howard drive past his house and eventually told her to stop in front of a randomly chosen house which was close to a bridge in south Omaha. He was screaming at Howard that she was the only person who knew that he was "there," which she understood to mean at Hoult's apartment, and that she would be an accessory if she told anyone. Howard said that she was not concerned then about what he might have done to Hoult, because she was afraid of what he might do to her. He instructed her to drive across the bridge. While they were crossing the bridge, he rolled down the passenger window and threw something out. Howard did not see what he threw out because he told her not to look at him. Howard then dropped Burries off at his house. It was almost 5 a.m. when Howard returned to her home.

As stated, Burries' cell phone did not receive Hoult's last text message until 5:54 a.m. on Friday. The testimony of an investigator who performed digital forensics for the State showed that if a person puts his or her cell phone into airplane mode or turns it off, it will not receive a text message during this period. The cell phone records showed that approximately 4 minutes after receiving Hoult's last text message, Burries responded. He asked why she had not answered his messages. He said that he had done what she asked and burned all the clothes that reminded her of "that night" in the fireplace and that he wanted to move on. He repeated that he wanted to come over and accused her of playing games by ignoring his text messages. His periodic text messages to Hoult continued until 9 p.m. on Friday. None were opened.

Between 4 and 5 a.m. on Friday, Burries also contacted Melissa Eledge, whom he had been seeing and asked her to pick him up. Eledge arrived at Burries' house before 6 a.m.

She said that Burries was intoxicated and asked her to take him to his brother's house. He was carrying a gray or black bag. Eledge waited in the car while Burries went inside his brother's house for 5 to 10 minutes. When he returned, he asked Eledge to take him to a tire store. When they arrived, Burries took the bag and went to a house next to the tire store. He did not explain his actions to Eledge.

After that stop, Eledge took Burries back to his house. During the drive, Burries told Eledge that he was texting an old girlfriend named "Tina Hoult." He told Eledge that Hoult was mad at him for wearing the same clothes that he had worn when he went to jail and that she wanted him to get rid of them. When they arrived at Burries' home, Eledge believed that she could smell something that had been burned inside. After Eledge's memory was refreshed, she testified that she had asked Burries about the smell and that he had told her he had been "'burning stuff'" before she arrived.

One of Burries' roommates, Eric Paine, testified that on Friday morning when he woke up, he saw embers from a fire in the fireplace and noticed a heavy smoke smell in the house. Paine said that Burries called him from Howard's house sometime in the early afternoon on Saturday, May 17, 2014. Burries asked him to buy him some items from a store. When Paine arrived at Howard's house, Burries was cleaning a boat with Howard's father and asked Paine to pick up two bottles of ammonia for cleaning.

Burries texted Eledge on Saturday between 1 and 2 p.m. to tell her that he was going to Iowa. About 2:30 p.m., he arrived at the house where Eledge was. He brought cleaning supplies and carpet shampoo with him for cleaning out the car he was driving. Unknown to Eledge, Burries had arrived in Howard's car. He and Eledge cleaned Howard's car for about an hour. About 3 to 4 p.m. on Sunday, May 18, 2014, Burries told Eledge he was going fishing with friends and left.

Sunday evening, Howard called Burries to ask when he would be returning her car. Burries told her that Hoult had

been found "fucked up in her apartment" and that he was going to call the detectives to "clear his name." He returned her car a couple of minutes later. Police officers arrived at Howard's house shortly thereafter and seized the car.

Also on Sunday evening, investigators arrived at Burries' residence, but he was not home. Around midnight, Burries called Paine while investigators were at the house and asked to speak to a police officer. Burries told the officer that he was getting an attorney and planned to come in the next day. Officers noticed that the fireplace had been cleaned out recently, and Paine told them that he had not done it. Investigators searched a bag of ash they found in the trash but did not find any clothing remnants.

On the morning of May 19, 2014, Burries came to Eledge's home. While there, he told her that he needed to get out of town. He seemed "frazzled," and kept saying that "[i]t was bad" and he needed to get out of town. He told Eledge that he was going to St. Louis and asked if she would at least take him to Kansas City. Shortly thereafter, they left her house and traveled to "St. Joe." During the trip, Burries had two cell phones with him and would power them off when he was not using them.

### 2. Burries' Statements to Police Investigators

A Missouri state trooper arrested Burries in Missouri at about 5 p.m. on Monday. Two Nebraska investigators traveled to Missouri to interview him. After Det. Larry Cahill, with the Omaha Police Department, advised Burries of his *Miranda*[1] rights, he asked if knowing these rights, Burries was willing to talk to the officers. Burries said, "Within limitations, I'll talk to you." During the investigation, Burries stated that he and Hoult had hit each other during their fights and

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

admitted that he had been incarcerated from December 2012 to November 2013. He admitted that Hoult had given him a key to her apartment. He admitted to burning his clothes between 3 and 5 a.m. on Friday. He stated that at Hoult's request, he had burned his jeans, a cream-colored jacket, and a black hoodie in his fireplace. But when Cahill informed Burries that investigators had learned from Howard that he was at Hoult's apartment when she was murdered and that he had told Howard not to talk about it, Burries cut off the interview until he had an attorney.

### 3. Pretrial Proceedings

Before trial, the State filed notice that it intended to present evidence under Neb. Evid. R. 404.[2] It also requested a pretrial hearing to determine the voluntariness of Burries' statements to investigators. Burries moved in limine to exclude the evidence that the State wanted to present. He argued it was inadmissible on grounds of foundation, relevance, hearsay, or prejudice.

For the voluntariness portion of the hearing, the court admitted the audio recording of the investigator's interview of Burries in Missouri. The court later ruled in a written order that the statement was admissible.

Regarding the State's rule 404 motion, the State argued that it intended to prove Burries had assaulted Hoult in December 2012, had served a year of imprisonment for the crime, and had harmed or threatened Hoult since 2012. For the hearing, the court admitted a copy of the complaint, conviction, and sentencing order for the 2012 assault, which evidence showed Burries was convicted of assaulting Hoult and was sentenced to 2 years' imprisonment. In addition to these documents, the State intended to present the testimony of witnesses who had seen Hoult after the 2012 assault. The State also intended to call "a number of witnesses" to prove "motive, opportunity,

[2] See Neb. Rev. Stat. § 27-404 (Reissue 2016).

intent, preparation, plan, knowledge, and identity." But it did not specify the purpose for admitting any witness' testimony, and it argued that its evidence "may not be [rule] 404 evidence but rather really res gestae of the crime."

In support of its res gestae argument, the prosecutor stated that Burries had told his roommate that the clothes he burned on Friday morning were the clothes that still had blood on them from the last time he assaulted Hoult. The State argued that because of Burries' statement, the 2012 assault was res gestae to the murder crime: "[A]rguably, the clothes he was burning [were] either bloody clothes from the actual event in this case or the previous assault." The State also argued that the 2012 assault was inextricably intertwined with the murder charge because very soon after the murder, Burries had told Cahill that he had burned his clothes. Additionally, the State intended to present the testimony of witnesses who would say they had overheard telephone conversations in which Burries had threatened Hoult before her murder.

After the hearing, the court issued an order in which it addressed both the State's rule 404 motion and Burries' motion in limine resisting the evidence. The court ultimately accepted the State's argument that Burries' December 2012 assault of Hoult was inextricably intertwined with her murder in May 2014:

> [T]he events surrounding the December, 2012 incident, including [Burries'] conviction, are admissible, particularly because there is evidence of the burning of clothes by [Burries] so close to the time of the murder of . . . Hoult. The State will argue this was an act of [Burries] to dispose of the evidence of . . . Hoult's murder even though [Burries] argues that the clothes that were burned were from the 2012 incident. The 2012 incident is an integral part of the allegations against [Burries] in this case such that the evidence may "complete the story or provide a total picture of the charged crime[.]"

The court then set out the specific testimony that it would allow from the State's witnesses. It rejected Burries' relevance, hearsay, and foundation challenges to the witnesses' testimonies.

### 4. State's Evidence at Trial of Burries' Other Bad Acts

Despite the court's inextricably intertwined ruling, just before the State presented evidence at trial, the court again heard argument as to the State's evidence of Burries' other bad acts. The court ruled that Burries' attorney could have a standing objection to the rule 404 evidence that the court ruled on in its pretrial order. The court rejected Burries' request to give an instruction limiting the jurors' consideration of the evidence to help them decide whether he had a motive to murder Hoult. The court stated that it was "just going to read [rule] 404(2), as to evidence of other crimes, wrongs, et cetera." The State agreed to this approach, arguing that all of its intended evidence was relevant to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absen[ce of] mistake or accident."

One of the court's approved witnesses was the apartment complex maintenance manager. He stated that in 2010, Hoult moved into apartment No. 19. He also testified that in December 2012, Hoult asked him to come to her apartment, at which time he saw that she had been beaten. Her eyes were blackened, and he saw blood on her face, arms, and neck. The manager then changed Hoult's lock, and later that month, she moved to apartment No. 142. He said he changed her locks at least three times before she moved to apartment No. 142. After the manager's testimony, in the jury's presence, the State submitted exhibit 1, which it described as a copy of Burries' conviction and sentence for assaulting Hoult on December 1, 2012.

Brian Coburn was Hoult's neighbor when she lived in apartment No. 142. He testified that when he first met Hoult

in October 2012, she had obviously been beaten up because her eyes were blackened and swollen. Coburn testified that he knew Hoult had a boyfriend named "Tony." About a month before Hoult's murder, Coburn was out by the parking lot with Hoult when a car passed them. Hoult identified the driver as "Tony," and then received a call from "Tony." She put the call on "speaker," and Coburn could hear Tony asking Hoult where she was. Hoult said she was home, and Tony called her a "'fucking liar'" and said, "'I will find you, you cunt — you f'ing cunt.'" Coburn said Hoult looked a little nervous but brushed it off. Coburn said that on the Sunday before Hoult was murdered, Hoult came to his apartment and asked him to check her apartment because she thought "Tony" was inside.

Another witness testified that in 2014, he and his wife lived across the hall from Hoult's apartment. He testified that when Hoult was moving into apartment No. 142, he saw her in the hall and she had a black eye. She told him that the black eye was the reason she was moving.

Terry Robinson also lived in Hoult's apartment complex and met her in the summer of 2013. About the middle of April 2014, he was with Hoult and other neighbors in the outside commons area when her cell phone rang. She told Robinson that he could answer it, and he saw the name "Tony" on her cell phone. A male, whom Robinson believed to be Burries, asked where Hoult was and said that "he did time once for [Hoult] and he wasn't scared to do it again."

On Monday, May 12, 2014, Robinson and three other people were with Hoult in her apartment when her cell phone rang. She told Robinson that the call was from "Tony," and Robinson could hear that the male caller was upset. Hoult held the cell phone so he could listen. "Tony" said that Hoult had "'better be [home] when [he] g[o]t there'" and that he had come by the previous night and she was not home. Robinson said Hoult "teared up" during this call. He and Hoult's other guests then went outside while she was talking. When Hoult joined them,

she told Robinson that "Tony" had accused her of cheating and threatened to "beat her, revive her, and repeat it."

As stated, Steffanie Beck was Hoult's long-time friend and had worked with Hoult for 4 years before the murder. Beck had never met Burries, but she knew he was Hoult's boyfriend. Beck said that she knew Burries' voice because he had called Hoult many times from jail when Beck was present, and Hoult would hold the cell phone so that Beck could hear him. While Burries was incarcerated, Beck said she had heard him accuse Hoult of cheating and threaten to "kill her, tear her face off, cut her legs off."

Beck also said that when Burries was going to be released, Hoult was nervous and planned to leave the state and move in with her mother. Beck testified that the last time she saw Hoult was on Thursday afternoon, May 15, 2014, when Beck was leaving work and Hoult was walking in from the parking lot. Although it was a hot day, Hoult was wearing a long-sleeved jacket. Beck thought Hoult was hiding something and convinced Hoult to take the jacket off. Beck said that Hoult had bruising on her arms from her elbows to her shoulders but told Beck it was nothing.

Howard testified that she had received a 4-page handwritten letter from Burries a few days before giving her trial testimony. After the court gave its rule 404(2) instruction, it allowed the prosecutor to read the entire letter verbatim. In the letter, Burries warned Howard that he would be getting out shortly and not to "lie" at his trial. He threatened retribution to anyone who interfered with his ability to rear his children.

### 5. DNA Evidence

At trial, Mellissa Helligso, a forensic DNA analyst, testified for the State about her testing of a blood sample from Hoult's arm. Helligso testified the testing showed that the blood was from a single source and that Hoult could not be excluded as the contributor, because every allele she detected in Hoult's DNA profile matched the alleles that she found in the blood

sample. An allele is a genetic variation in the sequencing of the DNA molecule at one of the specific segments, or loci, with known individual variations, which forensic analysts focus on to determine an individual's DNA profile.[3] The prosecutor also elicited Helligso's testimony that the DNA testing had produced an allele that could have been a common "artifact" that the testing produces or it could have come from another person, but that she could not compare a single allele to another person's profile.

Burries' attorney did not object to the prosecutor's questions or the expert's testimony. On cross-examination, he elicited testimony that the allele could have come from someone else and that the State's expert had not analyzed Burries' DNA profile.

## III. ASSIGNMENTS OF ERROR

Burries assigns, restated and renumbered, that the court erred as follows:

(1) in finding that Burries' statements to investigators were voluntary;

(2) in admitting evidence of his 2012 assault of Hoult and threats that he made to her because the evidence constituted hearsay, lacked proper foundation, was irrelevant, or was inadmissible under Neb. Evid. R. 403[4];

(3) in allowing the State to introduce the same evidence under rule 404(2) and as part of the res gestae of the crime;

(4) in admitting an August 2015 letter from Burries to Howard, because the evidence was inadmissible under rules 403 and 404.

Additionally, Burries assigns that his trial counsel provided ineffective assistance as follows:

(1) in failing to file a motion to suppress Burries' statements to investigators when the recorded interview showed

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[3] See *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015).

[4] Neb. Rev. Stat. § 27-403 (Reissue 2016).

that Burries did not understand his constitutional right to a court-appointed attorney;

(2) in failing to object to irrelevant DNA evidence and exacerbating the jury's likely confusion by eliciting testimony that Burries could have been the contributor;

(3) in failing to renew an objection to the certified copy of Burries' assault conviction; and

(4) in failing to adequately investigate and present several aspects of Burries' defense.

## IV. STANDARD OF REVIEW

[1,2] An appellate court independently decides questions of law presented on appeal.[5] Whether a defendant voluntarily made a statement while in custody and whether a defendant unambiguously invoked his or her right to remain silent or to have counsel present are mixed questions of law and fact. We review a trial court's finding of historical facts for clear error and independently determine whether those facts satisfy the constitutional standards.[6]

[3-7] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[7] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[8] We review for abuse of discretion a trial court's evidentiary rulings on relevance,[9] whether the probative value of evidence is

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[5] See, e.g., *State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016); *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016); *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

[6] See *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[7] *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016).

[8] *State v. Draper*, 295 Neb. 88, 886 N.W.2d 266 (2016).

[9] *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014).

substantially outweighed by the danger of unfair prejudice,[10] and the sufficiency of a party's foundation for admitting evidence.[11] We also review for abuse of discretion a trial court's evidentiary rulings on the admissibility of a defendant's other crimes or bad acts under rule 404(2), or under the inextricably intertwined exception to the rule.[12] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[13]

[8-10] When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of a proponent's evidence is a question of law, subject to de novo review.[14] Hearsay is not admissible except as provided by the Nebraska Evidence Rules.[15] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.[16]

[11,12] Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law,[17] which turns upon the sufficiency of the record to address the claim without an evidentiary hearing[18] or whether the claim rests solely on the interpretation of a statute or

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[10] *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[11] *State v. Casterline*, 293 Neb. 41, 878 N.W.2d 38 (2016).

[12] See, *Parnell, supra* note 5; *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013).

[13] *Draper, supra* note 8.

[14] *Smith, supra* note 7.

[15] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[16] See *State v. Trice*, 292 Neb. 482, 874 N.W.2d 286 (2016).

[17] See *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

[18] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

constitutional requirement.[19] We determine as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.[20]

## V. ANALYSIS

### 1. Burries Validly Waived His Right to Counsel When He Made Incriminating Statements to Investigators

After the pretrial hearing on the admissibility of Burries' statements to police investigators, the court determined that the statements were voluntary:

> There is nothing to suggest that [Burries'] statement was involuntary. While there is no question that [Burries] was in custody at the time, he was advised of his Miranda rights and once he requested an attorney no further substantive questions were asked of [Burries]. Although he mentioned getting an attorney early in the interview, he did not invoke his right to an attorney in such a manner that it was unequivocal.

Burries does not contend that the officer's language was insufficient to convey his *Miranda* right to appointed counsel if he could not afford one. He posits no other language that the officers should have used. Instead, without citing any authority, Burries argues that under these circumstances, the officers should have reread the advisement and confirmed his understanding of his right to a free appointed counsel. We disagree.

[13-15] *Miranda* warnings are "'an absolute prerequisite to interrogation' . . . and 'fundamental with respect to the Fifth Amendment privilege.'"[21] If a defendant seeks suppression

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[19] See *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014).

[20] See *id.*

[21] See *State v. Juranek*, 287 Neb. 846, 856-57, 844 N.W.2d 791, 801 (2014), quoting *Miranda, supra* note 1.

of a statement because of an alleged *Miranda* violation, the State must prove that the defendant validly waived his or her *Miranda* rights by a preponderance of the evidence.[22] We look to the totality of the circumstances to determine whether a defendant validly waived his or her *Miranda* rights during an interrogation:

> *Miranda* rights can be waived if the suspect does so knowingly and voluntarily. A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. In determining whether a waiver is knowingly and voluntarily made, a court applies a totality of the circumstances test. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct.[23]

[16] But law enforcement officers "are not required to rewarn suspects from time to time. . . . The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions."[24]

Before questioning Burries, Cahill read him the following *Miranda*[25] advisements: You have the right to remain silent and not make any statements; anything that you may say can be used against you in a court; you have the right to consult with a lawyer and have a lawyer with you when you are questioned; if you cannot afford a lawyer, the court will appoint one to

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[22] See *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004), citing *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). See, also, *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010), citing *Miranda, supra* note 1.

[23] *State v. Goodwin*, 278 Neb. 945, 956, 774 N.W.2d 733, 743 (2009). Accord *Fernando-Granados, supra* note 22.

[24] See, e.g., *Berghuis, supra* note 22, 560 U.S. at 386-87.

[25] *Miranda, supra* note 1.

represent you. After each statement, Cahill asked Burries if he understood and Burries said yes.

[17] In *Miranda*, the U.S. Supreme Court stated that a suspect

> must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[26]

But the precise advisement language set out in *Miranda* is not mandatory.[27]

[18] We have recognized that under *Patterson v. Illinois*,[28] *Miranda* warnings which adequately inform a defendant of his or her Fifth Amendment right to counsel are also adequate to inform a defendant of his or her Sixth Amendment right to counsel.[29] In either case, the "key inquiry" in determining whether a defendant waived his right to counsel during an interrogation is whether the defendant was "made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel."[30] And in analyzing waivers of the right to counsel during an interrogation under both the Fifth Amendment and the Sixth Amendment, the U.S. Supreme Court has held that substantially similar advisements were sufficient to convey to the defendant his right to counsel during the questioning even if he could not afford

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[26] *Id.*, 384 U.S. at 479.

[27] See, *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012), citing *California v. Prysock*, 453 U.S. 355, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981); *Fernando-Granados, supra* note 22.

[28] *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988).

[29] See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[30] *Patterson, supra* note 28, 487 U.S. at 292-93.

one, and sufficient to convey the consequences of forgoing that right.[31]

[19] Although an "express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of the waiver," it is not dispositive.[32] But here, the totality of the circumstances shows that Burries understood his right to consult with counsel and that he voluntarily and intelligently waived that right to the extent that he answered Cahill's questions.

Immediately after Cahill advised Burries of his *Miranda* rights, Burries stated that he would answer questions with some limitations. He explained that he wanted to answer some questions with an attorney present:

> I'm not going to throw the lawyer word out there right now, but I'm going to say this though. There's a lot of things that I would like to talk about. I would like to talk about in the presence of my attorney. I mean I'll get one eventually. I don't [know] when. I don't know how. [Slight pause.] But in [the] simplest terms, this situation with me and [Hoult] has been going on for way too long.

Burries contends that his statement—he did not know when or how he would get an attorney—showed he did not understand that he had the right to a free attorney if he could not afford one. But his other statements during the interrogation refute that argument.

When Cahill asked Burries if he wanted to talk about Friday morning, Burries said, "That's the point where I should probably have somebody here, but I'm going to break it down flat out from the point of 10 talking to her on Thursday evening up 'til going to the bar about 11:30-12, getting home about 2:30-3 in the morning." He then made the incriminating

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[31] See, *Patterson, supra* note 28; *Prysock, supra* note 27. Accord *Wilkerson v. State*, 365 Ark. 349, 229 S.W.3d 896 (2006).

[32] *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).

statements about burning his clothes on the night that Hoult was murdered, purportedly because Hoult had asked him to get rid of his clothes from their fight in December 2012, to close the door on their past. He stated that these clothes still had blood on them and that between 3 and 5 a.m. on Friday, he burned his jeans, a cream-colored jacket, and a black hoodie in his fireplace.

Cahill then told Burries that he knew Howard drove him to Hoult's apartment about 3 a.m. and drove him to a bridge afterward where he threw something off the bridge. He said Howard had placed him at Hoult's apartment at the time of the murder and that he knew Burries had told Howard not to talk to anyone about the incident and had burned his clothes after Howard dropped him off at his home. Burries responded that he could not give Cahill any information and cut off the questioning: "I'm going to leave it at that and I'm going to talk to my attorney about it. . . . I'll talk to my attorney, and then we'll talk." Cahill told Burries he could talk to him later with an attorney if he wanted. Burries said that he was definitely going back to Nebraska and that his trip was about getting money for an attorney, not running. Cahill said that after Burries was booked for a homicide in Nebraska, he could get an attorney or one would be appointed, but that their current conversation would stop.

Burries' firm statement that he was ending the interrogation until he could consult with an attorney demonstrated his understanding of his right to do so. Burries' understanding of his rights is further supported by his previous encounters with law enforcement in 2012. Finally, Burries specifically stated that he had gone to Missouri to get money for an attorney, and he was represented by a nonresident attorney at trial.

Under these facts, Burries' statement that he did not know how or when he would obtain an attorney was a reference to his intent to retain a paid attorney. It did not show that he failed to understand his right to have an attorney present even if he could not afford one. It is true that at the end of the

interrogation, Cahill stated that after Burries was booked for homicide in Nebraska, he could get an attorney or one would be appointed. But this statement was made after the questioning had stopped and was in response to Burries' statement that he had gone to Missouri to get money for an attorney. It did not negate Cahill's explicit *Miranda* advisements that Burries was entitled to consult an attorney and have an attorney present during the interrogation and that the court would appoint an attorney if he could not afford one.[33] We conclude that the court did not err in determining that Burries voluntarily and intelligently waived his right to counsel when he answered Cahill's questions, despite understanding his right to terminate the questioning until he obtained an attorney.

[20] This conclusion also resolves Burries' claim that his trial attorney provided ineffective assistance in failing to seek suppression of his statements during the interrogation. A defense counsel is not ineffective for failing to raise an argument that has no merit.[34]

### 2. Defense Counsel's Failure to Object to DNA Expert's Testimony and Cross-Examination of Expert Is Not Reversible Error

Burries contends that his trial attorney was ineffective for failing to object to the State's introduction of irrelevant DNA testing results through Helligso, its DNA expert. He argues that under our decision in *State v. Johnson*,[35] the introduction of this evidence was improper. He also contends that his trial counsel was ineffective in cross-examining Helligso because his questions suggested that Burries could have been a contributor to the DNA sample that she testified about.

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[33] See *Duckworth v. Eagan*, 492 U.S. 195, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989).

[34] See, e.g., *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015).

[35] *Johnson, supra* note 3.

(a) Additional Facts

As previously mentioned, Helligso testified that her testing of the blood sample from Hoult's arm contained DNA from a single source and that Hoult could not be excluded as the contributor because every allele she detected in Hoult's DNA profile matched the alleles that she found in the blood sample. The prosecutor then asked if the detected alleles had matched Hoult's profile perfectly or if there were some alleles in the blood sample "popping up" that did not match. Burries did not object. Helligso said that the testing showed one additional allele, "but it was in a position that is a common artifact when doing DNA testing, and I only had one extra allele. So when I only have one extra allele, I can't really compare that to anyone else, but the major profile and every other single number matched . . . Hoult." Helligso said that the term "artifact" meant something that was not real and just a product of the DNA testing and that there was no way for her to tell whether the allele was an artifact or from another person. She said that she could not "do anything with that information anyway" because she would need three to five additional alleles before she could determine that someone else's DNA was in the sample. She stated that for this reason, she concluded the DNA came from a single source. Burries did not object during this colloquy.

On cross-examination, Burries' attorney asked Helligso if she had determined that the artifact was not an allele because it fell below the threshold requirement for an allele. Helligso said no; it was above the threshold. This colloquy followed:

> Q. . . . Now, you never — you never actually ran [Burries' profile], but there is at least some possibility or maybe a very small possibility that this random allele could be coming from someone else besides . . . Hoult, correct?
>
> A. Yes.
>
> Q. Okay. You never did a profile for . . . Burries, correct?

A. Right.

Q. You also never did a profile for anyone else besides . . . Hoult in this case, correct?

A. Right.

On redirect examination, Helligso testified that even if she had detected a real allele and had the DNA profile for Burries or other persons, she could not have made a comparison with only one allele.

(b) Ineffective Assistance Standards

[21,22] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[36] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[37] An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[38] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[39]

(c) Admissibility of DNA Evidence

[23] In *Johnson*, we explained that the relevance of DNA evidence depends on its tendency "to include or exclude an individual as the source of a biological sample."[40] We reiterated that DNA evidence without a probability assessment does not aid the trier of fact to make that determination. We concluded that the trial court erred in admitting inconclusive DNA testing results from three biological samples.

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[36] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[37] *Betancourt-Garcia, supra* note 17.

[38] *Id.*

[39] *Id.*

[40] *Johnson, supra* note 3, 290 Neb. at 879, 862 N.W.2d at 771.

The DNA expert in *Johnson* testified that one DNA sample revealed a partial DNA profile for a minor contributor to the sample; a "'possible mixture'" because the expert had detected a "'possible allele'" separate from the victim's profile but could not determine if it was "'a true allele or not.'"[41] The expert could not draw any conclusions about the contributor to the partial minor profile in a second sample because she had detected only three weak alleles, two of which did not match the defendant's DNA profile. In a third sample, she detected a partial minor profile from a weak DNA sample, but did not explain why she could not exclude the defendant as the contributor despite recording alleles that did not match his profile.

[24-27] We explained in *Johnson* that a court should exclude an expert's opinion when it gives rise to two conflicting inferences of equal probability, so the choice between them is a matter of conjecture.[42] We concluded that a DNA expert's testimony that there may have been a minor contributor's DNA in a biological sample is irrelevant evidence because it is not probative of the source of the DNA.[43] Additionally, we held that a DNA expert's inconclusive results that a defendant cannot be excluded as a minor contributor to a biological sample allows the jury to speculate that the defendant might have been the minor contributor when the expert fails to provide any statistical relevance for the detected alleles in relationship to the defendant's DNA profile.[44] We held that the value of inconclusive DNA testing results is substantially outweighed by the danger that the evidence will mislead the jurors absent statistical evidence that will help them to assess whether a

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[41] *Id.* at 877, 862 N.W.2d at 770.

[42] *Johnson, supra* note 3.

[43] *Id.*

[44] *Id.*

defendant is or is not the source of DNA found in a biological sample.[45]

### (d) Defense Counsel's Failure to Object to Irrelevant DNA Evidence and Cross-Examination of State's Expert Did Not Prejudice Burries

The State contends that the instant case is distinguishable from *Johnson*. It argues that because Helligso testified that the additional allele she detected was probably an artifact, no inconclusive testing results were presented. It argues that on cross-examination and redirect examination, Helligso was discussing only a hypothetical scenario of "what if the artifact had been a true allele."[46] We disagree.

On direct examination, Helligso testified that she had no way of determining whether she had detected an artifact or an allele from another person. On cross-examination, Helligso conceded that the additional allele she detected during testing was probably an artifact or false reading, but she agreed that she could have detected an allele from another person. On redirect examination, she testified that even if it were a real allele, she could not compare it to another person's profile without detecting three to five alleles.

Helligso's testimony was the functional equivalent of presenting inconclusive DNA evidence that suggested a defendant could be linked to the evidence if investigators had found a better biological sample. We specifically held in *Johnson* that a DNA expert's opinion that there *may* have been a minor contributor's DNA in a biological sample was irrelevant because the evidence was not probative of the source of the DNA.[47] The same problem exists here. Evidence of a minor contributor in the blood sample could only be relevant to Burries' guilt

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[45] See *id*.

[46] Brief for appellee at 42.

[47] See *Johnson, supra* note 3.

if it tended to include or exclude him as the minor contributor. Because Helligso's opinion did neither, the jurors could find it relevant only through pure speculation. Accordingly, any relevance the evidence had was substantially outweighed by its potential to mislead the jurors.

But we need not consider whether any strategic decision justified defense counsel's failure to object to the evidence. In the context of the State's other evidence, we conclude that there is no reasonable probability that the result of the proceeding would have been different even if Burries' counsel had successfully objected to Helligso's testimony and had not elicited her testimony on cross-examination that the additional allele could have come from someone else and that she had not determined Burries' DNA profile.

First, the DNA evidence was weak. As stated, Helligso conceded that the additional allele was probably an artifact or false reading and that she had no way of determining whether the allele was an artifact or came from another person. Equally important, while the evidence permitted the jurors to speculate that Burries was linked to the evidence, this case is also similar to *Johnson* in that the State's other evidence of Burries' guilt was overwhelming.

Howard's testimony and the State's cell phone records showed that Burries was inside Hoult's apartment within minutes of 3:40 a.m. on Friday, when Hoult sent her last text message to him. After returning to Howard's car, he covered himself from view with his jacket, ordered her not to look at him, and demanded that she drive him across a bridge where he threw something out the passenger window. Shortly before he demanded that Howard drive him across the bridge, he threatened her that she would be prosecuted as an accessory if she told anyone that he had been at Hoult's apartment.

His statements to investigators showed that he had a key to Hoult's apartment and that after Howard drove him back to his residence, he burned his clothes in the fireplace. On Saturday, he thoroughly cleaned Howard's vehicle. On Monday morning,

after police officers had found Hoult's body and he knew they were investigating at his residence, he frantically told Eledge that something bad had happened and that he needed to get out of town. Shortly before trial, he again threatened Howard about testifying against him through a letter he penned.

We conclude that the record in this direct appeal is sufficient to show that Burries was not prejudiced by his attorney's failure to object to the State's inconclusive DNA evidence or his cross-examination of Helligso. There is no reasonable probability that the jury's guilty verdict rested on speculation that Burries' DNA was found in a blood sample taken from Hoult's arm.

### 3. Record Is Insufficient to Address Burries' Remaining Ineffective Investigation Claims

Burries also contends that his trial counsel was ineffective in failing to investigate and obtain favorable evidence from several potential witnesses and in failing to investigate other potential sources of favorable evidence.

Specifically, Burries contends that despite his requests, trial counsel failed to independently investigate, interview, depose, or subpoena each of the following entities and/or potential witnesses: subpoena cell phone location and/or global positioning system data, nor did he obtain all information extracted from Hoult's cell phone in 2014, which would have demonstrated that Howard, Burries, and/or Hoult were not present in the places or at the times offered by the State's theory at trial; subpoena records, receipts, and video from a fast-food restaurant, which would have disproved Howard's testimony regarding her visit to the restaurant at Burries' request on the night of the murder and further disproved the State's theory as to the timeline of the murder; call Burries' brother as a witness, who would have confirmed Hoult's involvement with multiple boyfriends with whom Hoult drank excessively and who subjected Hoult to violence; call Burries' brother-in-law as a witness, who would have testified similarly to Burries' brother,

and who also would have testified that he saw Howard in handcuffs on her front lawn just prior to her interview with police; call Burries' cousin as a witness, who would have testified that police interrogated her and disclosed their motive for maliciously prosecuting Burries—that all the women associated with Burries were scared of him and had been beaten and that it needed to stop; call an acquaintance of Burries as a witness, who would have provided an alibi for Burries at a time when, according to the neighbors' testimony, Burries was arguing with Hoult; subpoena an airline itinerary that would have corroborated Burries' alibi for the time when, according to the neighbors' testimony, Burries was arguing with Hoult in her apartment; call a potential witness who would have provided testimony invalidating the State's witnesses' claims that Hoult had bruising and that Burries had likely caused the bruising; call another potential witness who would testify as to seeing Hoult alive after the time of death according to the State's theory, corroborating a neighbor of Hoult's testimony that Hoult was alive the morning of Friday, May 16, 2014; subpoena records of a hospital which would have disproved Hoult's coworkers' testimony that Hoult did not work Friday, May 16; subpoena Hogan's work and cell phone records which would have disproved Hogan's alibi at the time of Hoult's death and proved that Hogan did have a romantic relationship with Hoult; obtain Hogan's prior criminal record which could have been used in impeachment; subpoena video footage from a bar in Hoult's neighborhood on May 13, which would have disproved the testimony of the State's witnesses; obtain all video footage of Hoult's apartment complex's address between the dates of May 14 and June 14, which would have supported the exculpatory testimony of two potential witnesses; subpoena medical records from Hoult's medical providers, which contained evidence suggesting drug use, supporting the defense's theory that Hoult's involvement in the illicit drug community led to her murder; obtain recordings of inmate calls from the Douglas County Correctional

Center which would have provided support to the defense's theory that someone other than Burries murdered Hoult; call Hoult's aunt, who would have testified as to Hoult's having multiple boyfriends at the time of her murder, at least one of which was potentially dangerous.

Burries further contends that trial counsel failed to act or present evidence during trial when trial counsel knew action was required or evidence should be presented. The following is a list of trial counsel's failures as alleged by Burries: confront a trial witness who was a police investigator with prior, off-the-record, inconsistent statements made to her during her interview with a potential witness who told her that she saw Hoult alive at 2:30 p.m. on Friday, May 16, 2014; make a record and move for replacement of a juror or a mistrial after he learned that one of the jurors had a close association with one of the State's witnesses; make a record and either move for replacement of a juror or a mistrial when the juror repeatedly slept through much of the trial; make a record and object during voir dire to the State's peremptory challenges that the State used those challenges to strike all but one minority juror for race-based reasons; present evidence of Burries' heavy intoxication at the time of his interview with Cahill; file a motion based on the State's violation of *Brady v. Maryland*[48] that occurred when the State refused to turn over exculpatory text messages it obtained during its 20l4 extraction of data from Hoult's cell phone; call as a witness a cell phone expert hired by Burries, who would have rebutted the testimony of the State's cell phone experts as to the reasons for the delayed text message between Hoult and Burries on May 16; impeach a trial witness who was a neighbor of Hoult with his prior inconsistent identification of a different man as Burries; introduce Burries' clothing that would have proved, contrary to the State's theory, that he did not burn the clothing he had worn on the night of May 15.

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[48] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[28,29] When a defendant's appellate counsel is not the defendant's trial counsel, the defendant must raise on direct appeal any claim that the trial counsel provided ineffective assistance, if the issue is known to the defendant or apparent from the record, in order to avoid a procedural bar to raising the claim later in a postconviction proceeding.[49] An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by a trial counsel when raising an ineffective assistance claim on direct appeal.[50]

[30,31] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[51] The determining factor is whether the record is sufficient to adequately review the question.[52] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[53] We will address a claim on direct appeal that a defendant's trial counsel was ineffective only if the record is sufficient to adequately review the question.[54] This principle applies to Burries' claims that his trial counsel should have investigated sources of potentially favorable evidence, and we do not address them here.

### 4. Court Did Not Err in Admitting Evidence of Burries' 2012 Assault of Hoult

Rule 404(2) provides the following:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may,

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[49] See *Parnell, supra* note 5.

[50] *Betancourt-Garcia, supra* note 17.

[51] *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016).

[52] *Id.*

[53] *Id.*

[54] See *Betancourt-Garcia, supra* note 17.

> however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[32,33] It should be noted that rule 404(2)'s list of permissible purposes is not exhaustive.[55] Nonetheless, under our decisional law, rule 404(2) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime.[56]

In its pretrial order, the court ruled that evidence of Burries' 2012 assault of Hoult was admissible under the inextricably intertwined exception to rule 404(2), because Burries had claimed that the clothes he burned on May 16, 2014, were from the 2012 assault. At trial, however, the court concluded that rule 404 governed the admission of the assault evidence. It overruled Burries' request to limit the jurors' consideration of 2012 assault evidence to determining whether Burries had a motive to murder Hoult. Instead, the court stated it would read rule 404(2) as an instruction to the jury. The State then agreed that all of its intended evidence was relevant to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absen[ce of] mistake or accident."

(a) Parties' Contentions

Burries contends that the court committed reversible error when it admitted documentary and testimonial evidence of his 2012 assault of Hoult. He argues that the State's primary purpose for presenting this evidence was to establish that he had a bad character and to suggest that he likely killed Hoult because of his propensity to perpetrate domestic violence. He contends that the court erred in concluding in its pretrial order that the evidence was part of the res gestae of the crime. He argues that the assault occurred 17 months before Hoult's murder and was not closely intertwined with it.

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[55] See *Parnell, supra* note 5.

[56] See *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994).

Burries also contends that both the prosecutor's arguments to the court for admitting the evidence and the court's instruction to the jury did not comply with our requirements under *State v. Sanchez*[57] for admitting evidence of a defendant's other bad acts under rule 404(2). He argues that the prosecutor offered no purpose for the evidence other than to state it was res gestae evidence and that the court failed to identify a specific purpose for which it would receive the evidence.

The State contends that rule 404 did not apply because the evidence of Burries' 2012 assault of Hoult and Beck's testimony of his past conduct was inextricably intertwined with the charged murder. It argues that this evidence was part of the factual setting of the crime because it showed the following: (1) the increasingly violent nature of Hoult and Burries' relationship; (2) why law enforcement focused on him as a suspect; (3) what Burries meant when he told investigators that he had burned his clothes from the December 2012 assault at Hoult's request; (4) why Hoult sent texts to Burries about his control of her and his threats to torture her, and why she stated that she did not feel safe around him; and (5) what Burries meant when he told Robinson that "he did time once for [Hoult] and he wasn't scared to do it again." The State argues that without Beck's testimony and evidence of Hoult's injuries from the 2012 assault, the jury would believe that despite Hoult's long-term relationship with Burries, she had an "unexplained and unsupported fear of Burries."[58]

### (b) Evidence of Burries' 2012 Assault Was Inextricably Intertwined With Charged Murder

[34] Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof

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[57] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[58] Brief for appellee at 29.

of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.[59]

We have previously explained that our jurisprudence initially adopted a broad concept of this class of evidence.[60] Although in other cases we have partially backed away from the inextricably intertwined exception and instead applied a broader notion of rule 404, the exception is still viable.[61]

The 2012 assault of Hoult was part of the factual setting of her murder in May 2014. During the murder trial, the jury heard testimony that Burries and Hoult had a volatile relationship; that while Burries was in prison for the assault, he would call Hoult and threaten her; that after being released from prison, Burries threatened Hoult on multiple occasions; that prior to the murder, Hoult had injuries consistent with being assaulted; that Burries told Robinson that he had served time in prison for Hoult; and that Burries told Cahill and Eledge that he burned his clothes because they still had blood on them from the last time he assaulted her before he went to prison.

Burries himself repeatedly interjected the 2012 assault of Hoult into the 2014 murder of Hoult. Burries told investigators that Hoult had asked him to get rid of the clothes he had worn during the previous assault, Burries told Eledge that Hoult wanted him to get rid of the clothing from the last time he went to jail, and Burries told Robinson that "he did time once for [Hoult] and he wasn't scared to do it again."

The record supports the trial court's finding that the evidence of the assault was necessary to present a coherent picture of the murder. As a result, we conclude that the trial court did not err in its pretrial ruling that the 2012 assault was part of the factual setting of the crime.

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[59] See, e.g., *Parnell, supra* note 5.

[60] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

[61] See *id.*

We are cognizant of the fact that at trial, the court concluded that the admission of Burries' 2012 assault of Hoult was admissible under rule 404(2). However, since we find that the assault evidence was inextricably intertwined and not 404 evidence, we need not consider that ruling.

### 5. Court Did Not Err in Admitting Testimony of Burries' Threats of Further Assaults

Burries contends that the court erred by admitting the testimony from Hoult's acquaintances that Burries threatened Hoult while he was incarcerated from December 2012 to November 2013, and after his release from prison. However, in several circumstances, this court has held that evidence of a defendant's threats to a murder or assault victim can be admitted under the inextricably intertwined exception to rule 404.

In *State v. Smith*,[62] the defendant and another man were convicted of shooting two brothers, one fatally, after the brothers cooperated with federal authorities in exchange for more lenient sentencing. We concluded that rule 404 did not apply to evidence that within 30 to 40 days prior to the shootings, one of the defendants' made threatening statements to the brothers on two occasions. We held that the evidence was necessary to present a coherent picture of the crime and was part of the factual setting.

In concluding that the threats were inextricably intertwined with the shootings, we relied on another case involving evidence of a defendant's stated desire to harm or kill a murder victim. In *State v. Canbaz*,[63] the disputed evidence did not involve the defendant's threats to the victim. Instead, after the defendant's girlfriend broke up with him, he told witnesses that he wanted to kill her and her family members, or he made statements that evidenced his desire to kill her. Some of his

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[62] *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[63] *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

statements were made a few days before the murder, but others were made at an unspecified time after the defendant's girlfriend broke up with him in early July. He killed her in early September. We held that rule 404(2) did not govern the admission of the defendant's statements to these witnesses and that the trial court erred in concluding otherwise. Instead, the statements were admissible as evidence that the defendant had killed intentionally and with premeditation.

More recently, in *State v. Parnell*,[64] the defendant shot two women multiple times, killing one of them. The woman who survived described the defendant's vehicle, which she had previously seen. She testified that 2 days before the shooting, the defendant had threatened her with a gun because she had brought a rival gang member to a party. He was prosecuted and convicted of making a terroristic threat before the State tried him for shooting the women. The State filed notice that it intended to present evidence of the terroristic threat under rule 404 to show his motive, intent, and plan. After a pretrial hearing, the trial court ruled that the threat was inextricably intertwined with the shooting but would have also been admissible under rule 404. We affirmed the court's ruling that the inextricably intertwined exception applied. We reasoned that evidence of the threat was necessary to present a coherent picture of the crimes because it showed that he had acted upon a recent threat to the victim.

[35] Under this precedent, evidence of a murder defendant's previous threat to the victim or statement to others showing a desire to harm or kill the victim are facts that are inextricably intertwined with the charged murder if the defendant made the threat or statement fairly close in time to the murder.[65]

Accordingly, the inextricably intertwined exception applied to Beck's testimony that she overheard threats from Burries

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[64] *Parnell, supra* note 5.

[65] See *id.*

in his calls to Hoult while he was incarcerated. Though these threats were made at least 6 months prior to the murder, the threats were relevant to show that Burries killed Hoult intentionally or with premeditation or that he had acted on a recent threat to harm or kill Hoult.

The inextricably intertwined exception applied to Robinson's testimony of hearing Burries' statement about doing time for Hoult in April. It also applied to Robinson's testimony of seeing Hoult upset after getting a call from Burries in May. Further, it applied to Hoult's statement to Robinson shortly after that call about the threats made to her by Burries.

The inextricably intertwined exception applied to Coburn's testimony that about a month before Hoult's murder, he also heard Burries threaten Hoult.

Because Burries' threats prior to the murder were inextricably intertwined with the murder, the court did not err in failing to comply with the procedural requirements for admitting evidence under rule 404 and failing to properly instruct the jury on the specific purpose for which it was receiving the testimony.

As we discuss later, we reject Burries' argument that the State failed to prove by clear and convincing evidence that Burries, and not someone else, had threatened Hoult. There was ample evidence that Burries was known as "Tony." These witnesses testified to hearing threatening statements in calls from "Tony" to Hoult, or Hoult told them that "Tony" had threatened her after speaking to him on her cell phone.

### 6. Court Erred in Admitting Burries' Threatening Letter to Howard

#### (a) Additional Facts

Burries' letter to Howard was presented to the court during the trial because Howard gave it to the prosecutor when she appeared to testify. During an in camera hearing, the State argued that the letter was relevant because Burries' intimidating statements to Howard bordered on witness tampering. The

prosecutor stated that if the court ordered a redaction, she would comply. But she felt strongly that the entire letter should be admitted. Defense counsel did not believe the letter was admissible at all but stated that the defense would consider a redacted version after seeing it. The court agreed with the prosecutor and admitted the entire letter.

Before the letter was read to the jury, the court instructed the jury as follows:

> [S]ome of the evidence you are about to receive is — evidence of other crimes, wrongs or acts is not admissible to prove the character of a person or in order to show that he or she is acting in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(b) Parties' Contentions

Burries contends that the court erred in admitting the entire letter because portions of the letter were not relevant for any purpose other than proving that he had a bad character. He also contends that the court erred in reciting potential purposes under rule 404(2) per the letter, instead of providing the jury with a precise purpose for which the court was admitting the evidence. The State responds that Burries did not ask for a redaction and that even if he had, the unredacted portions would have been the most probative of his consciousness of guilt. Relying on *State v. Jenkins*,[66] the State also argues that Burries' letter was not subject to rule 404 and that it was highly probative of his consciousness of guilt.

(c) Resolution

We disagree with the State that Burries' attorney should have requested a redaction when the prosecutor offered to redact the letter and the court determined that the entire letter was admissible under rule 404. However, as the State argued,

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[66] *State v. Jenkins*, 294 Neb. 475, 883 N.W.2d 351 (2016).

the unredacted portions would have been the most probative of his consciousness of guilt and the admission of the remaining portions of the letter was harmless error.

We also disagree with the State that under *Jenkins*, Burries' letter to Howard was not subject to rule 404. In *Jenkins*, the defendant was convicted of first degree murder. Sometime after the murder, the defendant got into a heated argument with her mother. When her brother took the defendant into a different room, her sisters heard her yell that she would "'pop that bitch like I popped that nigga.'"[67] We concluded that in the context of witnesses' testimonies, the jurors could have reasonably inferred that she had threatened to shoot her mother, just like she had shot the victim. We concluded that her statement was an admission, which was not subject to exclusion under rule 404(2), because it was direct evidence of the charged crime. But Burries did not admit to killing Hoult in his letter to Howard, so *Jenkins* does not control here.

[36] However, we do agree with the State that Burries' letter to Howard was intended to threaten her on the eve of her testimony. This court has held that "[a] defendant's attempted intimidation or intimidation of a State's witness is evidence of the defendant's 'conscious guilt' that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crime charged."[68]

In *State v. Clancy*,[69] evidence was presented that the defendant had called a woman and threatened to kill her or her husband or to blow up their house if the woman provided further information to law enforcement authorities. We held that evidence of a threatening communication to a witness had probative value and was admissible as relevant evidence if it

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[67] *Id.* at 480, 883 N.W.2d at 357.

[68] *State v. Clancy*, 224 Neb. 492, 499, 398 N.W.2d 710, 716 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989).

[69] *Id.*

allowed a reasonable juror to believe that it was more probable that the declarant was conscious or knew that a crime had been committed.[70]

As such, Burries' letter to Howard was relevant to show his consciousness of guilt.[71] Though neither the prosecutor nor the court stated this purpose, the court acknowledged that portions of the letter were relevant to show Burries' threats to a witness.

However, we also held in *Clancy* that consciousness of guilt evidence is subject to rule 404(2).[72] As a result, evidence of Burries' letter to Howard was subject to the same procedural requirements as other evidence offered under rule 404(2).

[37] Pursuant to rule 404(3), before the prosecution can offer evidence of a criminal defendant's extrinsic acts under rule 404(2), it must first prove to the trial court, by clear and convincing evidence and outside the jury's presence, that the defendant committed the act.[73]

[38-40] Upon objection to evidence offered under rule 404(2), the proponent must state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court must similarly state the purpose or purposes for which it is receiving the evidence.[74] A trial court must then consider whether the evidence is independently relevant, which means that its relevance does not depend upon its tendency to show propensity.[75] Additionally, evidence offered under rule 404(2) is subject to the overriding protection of rule 403, which requires a trial court to consider whether the probative value of the evidence is substantially outweighed

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[70] *Id.*

[71] See *id.*

[72] See *id.*

[73] See *Jenkins, supra* note 66.

[74] See, e.g., *id.*; *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[75] See, *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016); *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

by the danger of unfair prejudice.[76] Finally, when requested, the trial court must instruct the jury on the specific purpose or purposes for which it is admitting the extrinsic acts evidence under rule 404(2), to focus the jurors' attention on that purpose and ensure that it does not consider it for an improper purpose.[77]

In *Sanchez*, we agreed with the reasoning of federal courts under their counterpart to rule 404(2) that a fine line often exists between what is admissible and inadmissible evidence under this rule because such evidence can sometimes carry a substantial danger of unfair prejudice. "'Therefore, it is advisable for a trial judge to insist that a party offering [extrinsic acts] evidence place on the record a clear explanation of the chain of inferences leading from the evidence in question to a fact "that is of consequence to the determination of the action."'"[78]

[41] A proponent's clear explanation for evidence offered under rule 404(2) ensures that a trial court has an opportunity to examine the evidence for its independent relevance and the potential for unfair prejudice. The requirement that the trial court state on the record the purpose or purposes for which such evidence is received is primarily to ensure that an appellate court can review the trial court's ruling.[79] The requirement that the court give the jury a limiting instruction upon request ensures that the jury does not focus on the evidence for an improper purpose.[80]

In the instant case, the court's limiting instruction did not instruct the jury on the specific purpose or purposes for which the letter was being admitted. Instead, it instructed the jury

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[76] See, *Pullens, supra* note 10; *Perrigo, supra* note 56.

[77] See, *Oldson, supra* note 75; *Torres, supra* note 74.

[78] *Sanchez, supra* note 57, 257 Neb. at 307, 597 N.W.2d at 374, quoting *U.S. v. Murray*, 103 F.3d 310 (3d Cir. 1997).

[79] See *id.* Accord *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

[80] See *Oldson, supra* note 75.

that the evidence "*may* . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." (Emphasis supplied.)

The court's instruction allowed the jury to consider the letter for any purpose under rule 404(2) instead of considering it for Burries' conscious guilt for the crime charged, exclusively. As a result, the court's admission of the letter was error.

### 7. Court Properly Admitted Evidence of Burries' and Hoult's Statements to Robinson

Although we have concluded that Robinson's testimony about Burries' threatening statements to Hoult were inextricably intertwined with the charged crime, Burries argues that the court erred in failing to exclude his testimony under other evidence rules.

#### (a) Additional Facts

As previously mentioned, Robinson testified that about the middle of April, he answered a call on Hoult's cell phone and saw the name "Tony" on it. Robinson believed that he was speaking to Burries. Robinson said that after asking where Hoult was, the caller said that "he did time once for [Hoult] and he wasn't scared to do it again." The court overruled Burries' foundation objection to this testimony. In its pretrial order, the court explained its ruling:

> [Robinson] can testify as to what he saw and observed even though he cannot testify that the caller actually was [Burries]. This is no different from a fact witness testifying that he saw a particular make/model/color of car in a parking lot without . . . being able to specifically identify it as belonging to a Defendant. The evidence is still admissible even though it is subject to weight and credibility considerations.

Robinson also testified that on Monday, May 12, 2014, Hoult told him "Tony" was calling and that he overheard

part of the conversation and saw Hoult become distressed and emotional. He stated that about 20 to 30 minutes later, she told him that "Tony" had threatened to beat her, revive her, and beat her again. The court overruled Burries' hearsay objections to Robinson's testimony that Hoult told him "Tony" was the caller and that Hoult told him that "Tony" had said he would beat her. In its pretrial order, the court ruled that Hoult's statements to Robinson on May 12 were admissible under three hearsay exceptions: the excited utterance exception, the state-of-mind exception, and the residual exception.

(b) Foundation Challenge to Robinson's Testimony Regarding Burries' Call to Hoult in April 2014

Burries argues that the court erred in rejecting his foundation challenge because Robinson could not know that Burries was the person calling Hoult in April 2014 when he saw the name "Tony" on Hoult's cell phone. He argues that despite the court's ruling that Robinson could not identify Burries as the caller, it permitted him to testify that he believed the caller was Burries.

First, we reject Burries' interpretation of the court's order. The court meant that Robinson could testify to what he saw on Hoult's cell phone—i.e., the name "Tony"—even if Robinson could not positively know whether Hoult had assigned the name "Tony" to calls that she received from Burries' cell phone number. It did not preclude Robinson from testifying that he believed the caller was Burries. It ruled that the evidence was admissible even though it was subject to weight and credibility considerations.

[42-44] Second, we reject Burries' authentication argument. Neb. Evid. R. 901[81] requires authentication or identification of

[81] Neb. Rev. Stat. § 27-901 (Reissue 2016).

evidence sufficient to support a finding that a matter is what the proponent claims as a condition precedent for admission. But authentication or identification under rule 901 is not a high hurdle.[82] A proponent is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[83] If the evidence is sufficient to support a finding that the evidence is what it purports to be, the rule is satisfied.[84] And we have held that the identity of a participant in a telephone conversation may be established by circumstantial evidence such as the circumstances preceding or following the telephone conversation.[85] Many other courts hold the same.[86]

The State did not submit records of the cell phone calls that Hoult received in April 2014. But at that time, her cell phone was programmed to identify the caller as "Tony." As stated, ample evidence in the record established that Burries was known as Tony. The record also showed that Robinson knew Hoult had a boyfriend named "Tony" and that on May 12, 2014, he heard "Tony" speaking to Hoult on her cell phone in a threatening manner. It would have been an implausible coincidence if Hoult had known two different males named "Tony" who called her to make threats. Equally important, on redirect examination, Robinson testified that he recognized the voice he heard on May 12—when Hoult identified the caller as "Tony"—as the same voice that he had heard when he answered Hoult's cell phone in April. We conclude that the circumstantial evidence sufficiently established that Burries was the "Tony" who called Hoult's cell phone in April and spoke to Robinson.

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[82] See, e.g., *Casterline, supra* note 11.

[83] *Id.*

[84] *Id.*

[85] See *State v. McSwain*, 194 Neb. 31, 229 N.W.2d 562 (1975).

[86] See Annot., 79 A.L.R.3d 79 (1977 & Supp. 2017).

### (c) Hearsay Challenge to Robinson's Testimony About May 12, 2014, Call From Burries

Burries contends that the court erroneously ruled that Hoult's statements to Robinson on May 12, 2014, were admissible under residual hearsay exception or under the exceptions for excited utterances and to show the declarant's state of mind. The State argues that Burries' statements to Hoult were admissible as the statement of a party opponent and that Hoult's statements to Robinson were admissible as excited utterances. Regarding the excited utterance exception, Burries argues that Hoult did not tell Robinson about Burries' threats to beat her until 20 to 30 minutes after Robinson observed her change in demeanor during the call. He also suggests that Hoult was not upset by the time she made the statement because Robinson testified that she "'just needed someone to vent to.'"[87]

[45,46] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.[88] A declarant's out-of-court statement offered for the truth of the matter asserted is inadmissible unless it falls within a definitional exclusion or statutory exception.[89]

[47] Under Neb. Evid. R. 803(1),[90] the rule against hearsay does not exclude a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This exception comprises excited utterances.[91]

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[87] Brief for appellant at 27.

[88] Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2016).

[89] See, Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2016); *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[90] Neb. Rev. Stat. § 27-803(1) (Reissue 2016).

[91] See, e.g., *Smith, supra* note 62.

[48] Excited utterances are an exception to the hearsay rule, because the spontaneity of excited utterances reduces the risk of inaccuracies inasmuch as the statements are not the result of a declarant's conscious effort to make them.[92] The justification for the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity for reflection and produces utterances free of conscious fabrication.[93]

[49,50] For a statement to be an excited utterance, the following criteria must be met: (1) There must be a startling event, (2) the statement must relate to the event, and (3) the declarant must have made the statement while under the stress of the event.[94] An excited utterance does not have to be contemporaneous with the exciting event.[95] An excited utterance may be subsequent to the startling event if there was not time for the exciting influence to lose its sway.[96] The true test for an excited utterance is not when the exclamation was made, but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.[97]

[51] The period in which the excited utterance exception applies depends on the facts of the case.[98] Relevant facts include the declarant's physical conditions or manifestation of stress and whether the declarant spoke in response to questioning.[99] But a declarant's response to questioning, other than questioning from a law enforcement officer, may still be an

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[92] *State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016).

[93] *Id.*

[94] *Id.*

[95] See *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

[96] *Id.*

[97] *Britt, supra* note 92.

[98] *Hale, supra* note 95.

[99] See *id.*

excited utterance if the context shows that the declarant made the statement without conscious reflection.[100]

The record does not show the lapse of time from when Hoult ended her conversation with Burries and when Robinson saw her outside. Robinson testified that Hoult was still on the cell phone with Burries when he and Hoult's other guests went outside because "it was getting inappropriate for a child to be in the room." He said he saw Hoult 20 to 30 minutes later when she came outside. But she could have been on her cell phone with Burries until just before she appeared outside.

Moreover, Robinson's statement that Hoult "just needed someone to vent to" showed only that Hoult spoke voluntarily, as distinguished from responding to questioning. It did not show that Hoult was no longer speaking under the influence of nervous excitement and shock because of Burries' threats. Robinson specifically testified that Hoult came outside with tears in her eyes. We conclude that the court did not err in admitting Hoult's statement to Robinson under the excited utterance exception. Because we reach this conclusion, we do not consider the court's rulings that the statement was admissible under other hearsay exceptions.

### 8. Burries Failed to Preserve Error Regarding Coburn's Testimony About Hoult's Statements to Him

Burries contends that Coburn's testimony was inadmissible for other reasons, despite our conclusion that it was inextricably intertwined with the charged murder. Coburn testified that on the Sunday before Hoult was killed, he checked her apartment, because Hoult wanted him to make sure that Burries was not inside. After Coburn assured Hoult that Burries was not there, she gathered some clothes to stay at a friend's

[100] *Id.*

house. But when her friend did not come, Coburn took Hoult back to her apartment and made sure she was locked inside. Burries did not object to Coburn's testimony.

Burries argues that the court erred in its pretrial ruling that (1) Hoult's statements to Coburn were admissible under the residual hearsay exception and under exceptions for excited utterances and present sense impressions and (2) the testimony was relevant to show Hoult was avoiding Burries and the volatility of their relationship was escalating just before Hoult's murder. The State contends that Burries did not timely object to this testimony. Alternatively, the State argues that Coburn's testimony was relevant to show Hoult's fear of Burries and not offered to prove the truth of the matter asserted.

[52,53] A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.[101] Normally, when a motion in limine to exclude evidence is overruled, to preserve error for appeal, the movant must renew the objection when the particular evidence which was sought to be excluded by the motion is offered during trial.[102] We recognize that the court allowed Burries to have a standing objection to its pretrial rulings under rule 404. But it did not give Burries a standing objection to its pretrial rulings under any other rule of evidence. Accordingly, because Burries failed to object to Coburn's testimony at trial, he did not preserve his claimed errors for appeal.

### 9. Burries Failed to Preserve Error Regarding Another of Hoult's Neighbor's Testimony About Overhearing Arguments

Another of Hoult's neighbors testified that she would often hear loud arguments between Hoult and a male or Hoult

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[101] *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

[102] See *id.*

and a female. She thought that the last time she heard yelling between Hoult and a male was on the Wednesday or Thursday night before Hoult was killed. But she could not identify the male who had argued with Hoult because she never saw anything.

Burries contends that this testimony lacked foundation because she could not identify the male voice and that her testimony posed a high potential for unfair prejudice because Hoult could have been arguing with another person. However, the record shows that Burries failed to object to the neighbor's testimony at trial. So, we again conclude that he did not preserve his claimed error for appeal.

### 10. Court's Improper Admission of Burries' Letter to Howard Was Harmless Error

[54-56] In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the error was harmless beyond a reasonable doubt.[103] Harmless error review looks to the basis on which the jury actually rested its verdict. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered was surely unattributable to the error.[104] The erroneous admission of evidence is generally harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.[105]

As stated, the court erred in admitting evidence of the letter that Burries wrote to Howard shortly before the trial to show his consciousness of guilt. Although the letter was admissible for that purpose, the court's jury instruction was erroneous.

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[103] *State v. Rask*, 294 Neb. 612, 617, 883 N.W.2d 688, 693 (2016).

[104] *Draper, supra* note 8.

[105] See *State v. Williams*, 295 Neb. 575, 889 N.W.2d 99 (2017).

But the jury heard cumulative, and much stronger, evidence of his consciousness of guilt that was properly admitted.

Specifically, Howard testified that after she drove Burries away from Hoult's apartment, he had her stop in front of a randomly chosen house and screamed at her that she would be an accessory if she told anyone that he had been at Hoult's apartment that night. An innocent person would not have referred to Howard as an accessory or threatened her with criminal liability for reporting his whereabouts on the night Hoult was killed. Immediately after this statement, Burries had Howard drive across a bridge where he threw something out the window. Howard testified that she complied with his orders that night because she was afraid of what he might do to her. This evidence firmly established that Burries had attempted to intimidate Howard into silence and that she was afraid he would harm her.

Given the strength of the State's properly admitted evidence, we conclude that the jury's guilty verdict was surely unattributable to the court's error.

## VI. CONCLUSION

We conclude that the court erred in admitting evidence of Burries' letter to Howard without complying with the procedural requirements for admitting such evidence under rule 404(2). But we conclude that because the State's other evidence of Burries' guilt was overwhelming, the court's error was harmless beyond a reasonable doubt. As a result, we affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Patrick J. Combs, appellant.

900 N.W.2d 473

Filed August 4, 2017. No. S-16-798.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
4. **Criminal Law: Final Orders: Sentences.** In a criminal case, the final judgment is the sentence.
5. **Final Orders.** The three categories of final orders in Neb. Rev. Stat. § 25-1902 (Reissue 2016) are exclusive.
6. **Criminal Law: Pleadings: Directed Verdict.** A motion for judgment of acquittal is a criminal defendant's request, at the close of the government's case or the close of all evidence, to be acquitted because there is no legally sufficient evidentiary basis on which a reasonable jury could return a guilty verdict.
7. **Pleadings: Directed Verdict.** A motion for judgment of acquittal is simply another name for a motion for directed verdict of acquittal.
8. **Motions to Dismiss: Directed Verdict.** A motion to dismiss at the close of all the evidence has the same legal effect as a motion for directed verdict.
9. **Directed Verdict: Motions for Mistrial: Time.** A motion for judgment of acquittal or motion for directed verdict is untimely if made after a mistrial has been declared.
10. **Motions to Dismiss: Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion,

proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.

11. **Criminal Law: Final Orders.** A judgment entered during the pendency of a criminal cause is final when no further action is required to completely dispose of the cause pending.
12. **Double Jeopardy: Pleadings.** A plea in bar may be filed to assert any nonfrivolous double jeopardy claim arising from a prior prosecution.
13. **Pleadings: Final Orders: Appeal and Error.** An order overruling a plea in bar is a final, appealable order.
14. **Double Jeopardy: Pleadings.** A plea in bar may be used to raise a double jeopardy challenge to the State's right to retry a defendant following a mistrial.
15. **Constitutional Law: Double Jeopardy.** The 5th Amendment's protection against double jeopardy applies to states through the 14th Amendment to the U.S. Constitution.
16. **Constitutional Law: Criminal Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution prohibits a criminal defendant from being put in jeopardy twice for the same offense and unequivocally prohibits a second trial following an acquittal.
17. **Double Jeopardy.** The Double Jeopardy Clause's prohibition on retrial is not unequivocal when the first trial ends in a mistrial.
18. **Motions for Mistrial.** Where a mistrial is declared over a defendant's objection, he or she may only be retried if the prosecution can demonstrate a "manifest necessity" for the mistrial.
19. **Double Jeopardy: Motions for Mistrial.** Where a mistrial is declared at the behest of the defendant, the "manifest necessity" standard has no place in the application of the Double Jeopardy Clause.
20. **Double Jeopardy: Motions for Mistrial: Prosecuting Attorneys.** The narrow exception to the rule that where a defendant asks the court to declare a mistrial, the Double Jeopardy Clause does not bar retrial, is limited to those cases in which the prosecution's conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.
21. **Trial: Juries: Verdicts.** A jury's action cannot become a verdict until it is finally rendered in open court and received and accepted by the trial judge.
22. **Trial: Verdicts.** A verdict, to be of any validity, must be delivered in open court.
23. **Juries: Verdicts.** A vote taken in the privacy of jury deliberations is not a verdict.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Wright, Miller-Lerman, Stacy, Kelch, and Funke, JJ.

Wright, J.

## NATURE OF CASE

The appellant, Patrick J. Combs, was charged with four crimes in the district court for Lancaster County. His case was tried to a jury. After deliberating for 3 days, the jury reported that it was deadlocked. Combs moved for a mistrial, which the district court sustained. After the mistrial, Combs discovered that, according to the presiding juror, the jury had voted unanimously during its deliberations to acquit him on three of the four charges, but mistakenly thought it had to reach a unanimous verdict on all charges. Combs moved for a judgment of acquittal, which the district court overruled. Combs then filed a plea in bar, which the district court overruled. Combs appeals the overruling of his plea in bar on the ground that retrial of the three counts on which the jury reportedly voted to acquit him would violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. We affirm the district court's order overruling Combs' plea in bar.

## BACKGROUND

Combs was charged with four crimes in connection with his financial dealings with Harold and Beverly Mosher. Combs was charged with (1) attempted theft by unlawful taking, over $1,500; (2) abuse of a vulnerable adult; (3) theft by unlawful

taking; and (4) unauthorized use of a financial transaction device, over $1,500. The details of these allegations and the evidence presented at trial are not relevant to this appeal.

A lengthy jury trial was held. At the conclusion of the State's evidence and again after the defense's evidence, Combs moved to dismiss. These motions were overruled, and the case was submitted to the jury. During its deliberations, the jury submitted several questions to the court in writing, which the court answered. After 2 days of deliberations, Combs moved for a mistrial, "largely out of concern that the time has become fairly lengthy," which motion the district court overruled because the court "had no indication from the jury that there's a problem."

On the third day, the court spoke with counsel for Combs and the State and said, "The jury has submitted a question . . . that reads, The jury in the above-entitled case requests the court's advice on how to proceed as the jury is unable to reach a unanimous verdict at this time." Combs renewed his motion for mistrial. The district court overruled Combs' motion and gave the jury a supplemental instruction, over Combs' objection, instructing the jury to continue deliberating and urging the jury to continue trying to reach a verdict.

About 2 hours later, the district court received another note from the jury, requesting advice and stating that it was "deadlocked with no apparent ability to agree on a verdict." The court said, "This is the second communication I've had that they're deadlocked. I sent them to lunch after getting that communication earlier. It seems like they mean it now."

Combs' counsel renewed his motion for mistrial, saying, "[I]t is now quite apparent to me, you know, whether the verdict is eleven to one for acquittal or eleven to one for conviction or anything in between, that this jury has made it clear that any further deliberations would not be likely to result in a verdict." Counsel for the State agreed that the jury was deadlocked. The court said, "I don't think we're going to get anywhere with this jury or [get] any further with this jury," and

it declared a mistrial and dismissed the jury. The jury did not complete the verdict form it was given by the court.

After the mistrial, Combs filed a motion for judgment of acquittal. As to count 1, Combs argued that there was insufficient evidence presented by the State. As to the other three counts, Combs' counsel stated that he learned after trial that the jury had unanimously voted in its deliberations to acquit Combs on counts 2 through 4, but mistakenly thought it was required to have a unanimous verdict on all counts.

Combs presented the affidavit of the presiding juror. The presiding juror stated that she supervised the deliberations and conducted the votes of the jury members. She said that the jury voted unanimously to find Combs not guilty on counts 2 through 4. She said that following "extensive deliberations" on count 1, the jury voted 11 to 1 to find Combs not guilty. She said that she told the bailiff that "the jury had reached unanimous verdicts on 3 of the counts, without divulging which counts or whether [it] found guilty or not on those, but that [it] had deadlocked on the remaining count." The presiding juror assumed that this information was passed on to the judge. She said that "[i]t was the jury's general understanding from the jury instructions provided . . . that [it] had to find unanimously on all four counts, albeit separately guilty or not guilty on each count."

At the hearing on the motion for judgment of acquittal, the State submitted two emails that were sent from other jurors to the court, which potentially conflicted in part with the affidavit of the presiding juror. The emails were not affidavits and did not contain sworn testimony. In the first email, the juror said that the votes to find Combs not guilty on counts 2 through 4 were preliminary votes and that he believed the jurors were still free to change their minds. That juror also wrote that a holdout juror said that he felt pressured to vote not guilty. The juror confirmed in the email that the jury mistakenly believed it had to find Combs guilty on all four counts.

In the second juror email, the juror also said that the jury "seemed to agree not guilty on three" of the counts. The juror said that the holdout juror on the one count on which the jurors disagreed said that he "'went along'" with everyone else on the other three counts.

The district court overruled Combs' motion for judgment of acquittal.

Combs then filed a plea in bar to prohibit the retrial of counts 2 through 4 on the bases that the jury found him not guilty on those counts and that retrial would violate the Double Jeopardy Clause of the U.S. Constitution. The district court overruled the plea in bar. Combs appealed.

## ASSIGNMENTS OF ERROR

Combs asserts the district court erred in not sustaining his plea in bar for counts 2 through 4, of which the jury reportedly voted unanimously to acquit him. He also claims the district court erred in failing to sustain his motion for judgment of acquittal and failing to sustain his motion to dismiss at the close of the evidence. He argues that the district court committed plain error in not inquiring whether the jury was deadlocked on all or some of the counts. He also argues that "plain error exists" by the presiding juror's not publishing the jury's verdict for counts 2 through 4. Finally, Combs argues that the district court erred in admitting opinion testimony from a caregiver as to whether the alleged victim had capacity to execute legal documents.

## STANDARD OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law.[1] On a question of law, an appellate court reaches a conclusion independent of the court below.[2]

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[1] *State v. Todd*, 296 Neb. 424, 894 N.W.2d 255 (2017).

[2] *Id.*

## ANALYSIS

### Appellate Jurisdiction: Combs' Assignments of Trial Error

Because Combs' trial ended in a mistrial with no verdict, there was no final order or judgment. Therefore, this court lacks jurisdiction over Combs' assignments of error arising from his trial. The only final order in this case was the district court's overruling of Combs' plea in bar.

[3,4] This court has stated many times that "for an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment."[3] In a criminal case, the final judgment is the sentence.[4] Because Combs' trial ended in a mistrial, no sentence was issued. Thus, there is no final judgment. Because there is no judgment in this case, Combs may only appeal if there is a final order.

[5] Final orders have been defined by statute in Nebraska since 1858.[5] Under § 25-1902, the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.[6] We have interpreted these three statutory categories of final orders as exclusive.[7]

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[3] *Heckman v. Marchio*, 296 Neb. 458, 462, 894 N.W.2d 296, 300 (2017).

[4] See *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015). See, also, Neb. Rev. Stat. § 25-1911 (Reissue 2016).

[5] John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239 (2001). See, also, Neb. Rev. Stat. § 25-1902 (Reissue 2016).

[6] *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017).

[7] See *Heckman v. Marchio, supra* note 3, 296 Neb. at 464, 894 N.W.2d at 301 (rejecting judicially created collateral order doctrine that allowed appeals of orders not final under three categories of § 25-1902 and quoting Lenich, *supra* note 5, "'Section 25-1902 specifies three types of final orders, which implies that there are no others'").

The district court's overruling of Combs' motions to dismiss and motion for judgment of acquittal were not final orders.

Combs argues that "the Trial Court erred in failing to sustain the motion for judgment of acquittal as to all Counts" and that "the Trial Court erred in failing to dismiss the case at the close of the evidence." He argues that the court should have dismissed the charges at the conclusion of the State's evidence and should have entered a judgment of acquittal on all counts because the evidence was insufficient to submit the case to the jury.

[6-8] A motion for judgment of acquittal is "[a] criminal defendant's request, at the close of the government's case or the close of all evidence, to be acquitted because there is no legally sufficient evidentiary basis on which a reasonable jury could return a guilty verdict."[8] A motion for judgment of acquittal is simply another name for a motion for directed verdict of acquittal.[9] And a motion to dismiss at the close of all the evidence has the same legal effect as a motion for directed verdict.[10] Thus, whether styled as a motion for judgment of acquittal, motion for directed verdict, or motion to dismiss, these motions all have the same effect when used to challenge the sufficiency of the State's evidence at the conclusion of the State's case or the conclusion of the evidence.

[9] Combs' motion for judgment of acquittal was untimely because it was filed after the court declared a mistrial. Because a motion for judgment of acquittal is a motion for a directed verdict, such a motion logically cannot be made after a trial has ended in a mistrial.

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[8] Black's Law Dictionary 1170 (10th ed. 2014).

[9] See *State v. Foster*, 230 Neb. 607, 611, 433 N.W.2d 167, 169 (1988) (citing case from another jurisdiction and "not[ing] that [that jurisdiction's] motion for acquittal is procedurally the same as our motion for a directed verdict").

[10] *Mock v. Neumeister*, 296 Neb. 376, 892 N.W.2d 569 (2017).

[10] Combs has waived his claim that the district court erred in overruling his motions to dismiss. A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.[11]

[11] Here, Combs waived his right to challenge the overruling of his motions to dismiss by proceeding with trial and introducing evidence in his defense. And Combs cannot challenge the sufficiency of the evidence underlying a conviction because no verdict was reached by the jury; there is no conviction to challenge. Furthermore, the overruling of a motion to dismiss is typically not a final order.[12] As this court has said, "'A judgment entered during the pendency of a criminal cause is final when no further action is required to completely dispose of the cause pending.'"[13] The order overruling the motion to dismiss was not a final order because it did not "completely dispose of" the case.

Because Combs sought and was granted a mistrial, he cannot now challenge the district court's failure to inquire whether the jury was deadlocked on all counts. We point out that the better practice would have been for the district court to have inquired of the jury whether it was deadlocked on every count before it granted a mistrial.

Combs cannot challenge as error the presiding juror's failure to publish the jury's verdict on counts 2 through 4. Appellate

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[11] *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016).

[12] *StoreVisions, Inc. v. Omaha Tribe of Nebraska*, 281 Neb. 238, 795 N.W.2d 271 (2011) (concluding in civil case that motion to dismiss is not special proceeding and that overruling of motion to dismiss is not final order).

[13] *State v. Warner*, 290 Neb. 954, 959, 863 N.W.2d 196, 200 (2015) (discussing "the final order requirement in the context of § 29-2315.01" regarding appeals by the prosecution).

courts consider errors made by the trial court, which may relate to the jury. Our rules of appellate procedure direct appellants to include in their briefs a "separate, concise statement of each error a party contends was made *by the trial court*,"[14] not by the jury.

Finally, Combs cannot challenge the admission of certain opinion testimony because the court's admission of such testimony is not subject to review, since Combs was granted a mistrial. No judgment was rendered in Combs' trial because it resulted in a mistrial.

[12,13] But we have held that "a plea in bar . . . may be filed to assert any nonfrivolous double jeopardy claim arising from a prior prosecution" and that an "order overruling the plea in bar [is] a final, appealable order."[15] A plea in bar is a "'special proceeding'" for purposes of § 25-1902, and a nonfrivolous double jeopardy claim affects a substantial right.[16] Thus, the district court's order overruling Combs' plea in bar is a final, appealable order that we have jurisdiction to review.

## Overruling of Combs' Plea in Bar: Double Jeopardy

Combs argues that the district court erred in overruling his plea in bar. He argues that he presented evidence that the jury voted to acquit him on three of the four counts, but that the jury did not enter a verdict of acquittal on those counts because it mistakenly thought it had to reach a unanimous verdict on all counts. He asserts that he was effectively acquitted on those counts and that the Double Jeopardy Clause of the U.S. Constitution bars retrial.

[14] Under Neb. Rev. Stat. § 29-1817 (Reissue 2016), a criminal defendant "may . . . offer a plea in bar to the indictment that he has before had judgment of acquittal, or been

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[14] Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2014) (emphasis supplied).

[15] *State v. Williams*, 278 Neb. 841, 850-51, 774 N.W.2d 384, 392 (2009).

[16] *Id.* at 847, 774 N.W.2d at 390.

convicted, or been pardoned for the same offense." A plea in bar may be used to raise a double jeopardy challenge to the State's right to retry a defendant following a mistrial.[17]

[15-17] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution provides that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." The 5th Amendment's protection against double jeopardy applies to states through the 14th Amendment to the U.S. Constitution.[18] This provision prohibits a criminal defendant from being put in jeopardy twice for the same offense and "unequivocally prohibits a second trial following an acquittal."[19] But this prohibition on retrial is not unequivocal when the first trial ends in a mistrial.[20]

[18-20] Where a mistrial is declared over a defendant's objection, he or she may only be retried if the prosecution can demonstrate a "'manifest necessity'" for the mistrial.[21] But as the U.S. Supreme Court has said, "[Where] a mistrial [is] declared at the behest of the defendant, quite different principles come into play. [Where] the defendant himself has elected to terminate the proceedings against him . . . the 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause."[22] Where a defendant asks the court to declare a mistrial, the Double Jeopardy Clause does not bar retrial, subject to one "narrow exception."[23]

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[17] See *State v. Williams, supra* note 15.

[18] U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

[19] *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

[20] See *Arizona v. Washington, supra* note 19.

[21] *Id.*, 434 U.S. at 505.

[22] *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982).

[23] See *id.*, 456 U.S. at 673.

That narrow exception, where retrial is barred by the Double Jeopardy Clause following a mistrial declared on the defendant's motion, is "limited to those cases in which the [prosecution's] conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."[24]

In this case, Combs asked the district court three times to declare a mistrial. Double Jeopardy does not bar retrial where a defendant asks the trial court to declare a mistrial.[25] The narrow exception for circumstances in which the prosecution intends to provoke the defendant into moving for a mistrial does not apply here.

[21-23] We disagree with Combs that the jury acquitted him. While the jury may have voted or tentatively voted to acquit Combs on three of the counts in its deliberations, it did not reach a verdict. The verdict form was not filled out or signed, the jury did not announce a verdict and was not available to be polled by the parties, nor was any verdict accepted by the district court. Neb. Rev. Stat. § 29-2024 (Reissue 2016) provides, "When the jury have agreed upon their verdict they must be conducted into court by the officer having them in charge. Before the verdict is accepted the jury may be polled at the request of either the prosecuting attorney or the defendant." We have said that "[a] jury's action cannot become a verdict until it is finally rendered in open court and received and accepted by the trial judge"[26] and that "[a] verdict, to be of any validity, must be delivered in open court."[27] A vote taken in the privacy of jury deliberations is not a verdict. The fact that the jury may have planned to acquit him on three counts does not mean that the Double Jeopardy Clause

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[24] *Id.*, 456 U.S. at 679.

[25] See *id.*

[26] *State v. Anderson*, 193 Neb. 467, 469, 227 N.W.2d 857, 858 (1975).

[27] *Longfellow v. The State*, 10 Neb. 105, 107, 4 N.W. 420, 422 (1880).

prohibits retrial after the court declared a mistrial at Combs' own request.

Combs claims that the trial judge erred by not asking the jurors whether they were deadlocked on all counts. But Combs did not ask the court to inquire whether the jury had reached a verdict on all counts. Instead, he asked for a mistrial, which the court granted. Where Combs asked for and was granted a mistrial, the Double Jeopardy Clause does not bar his retrial.

## CONCLUSION

We affirm the order of the district court which overruled Combs' plea in bar. The Double Jeopardy Clause does not bar Combs' retrial after his first trial ended in a mistrial which was granted at Combs' request.

Affirmed.

Cassel, J., participating on briefs.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Lori Greenwood, appellant, v. J.J. Hooligan's, LLC, formerly known as Pies & Pints, LLC, and FirstComp Insurance Company, appellees.

899 N.W.2d 905

Filed August 4, 2017. No. S-16-932.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. **Workers' Compensation: Insurance: Contracts: Notice.** There is no requirement in Neb. Rev. Stat. § 48-144.03 (Reissue 2010) that a notice of cancellation sent by certified mail actually be received by the employer.
4. **Workers' Compensation: Insurance: Contracts: Notice: Proof.** To show compliance with Neb. Rev. Stat. § 48-144.03 (Reissue 2010), the insurer need only prove that it sent the notice of cancellation by certified mail to the employer.
5. **Insurance: Contracts: Notice: Proof.** When an insurance carrier is statutorily required to provide notice of cancellation before terminating a policy, the burden of establishing an effective cancellation before a loss is on the insurer.
6. **Notice: Proof.** A party may prove it has mailed an item by direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository.

7. ____: ____. Absent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository, proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide.
8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the Workers' Compensation Court: Thomas E. Stine, Judge. Reversed and remanded for further proceedings.

Rolf Edward Shasteen, of Shasteen & Morris, P.C., L.L.O., for appellant.

L. Tyler Laflin and Joshua R. Woolf, of Engles, Ketcham, Olson & Keith, P.C., for appellee FirstComp Insurance Company.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## NATURE OF CASE

This case concerns whether an insurance company complied with the notice of cancellation requirements under Neb. Rev. Stat. § 48-144.03 (Reissue 2010). The Nebraska Workers' Compensation Court dismissed FirstComp Insurance Company (FirstComp) as a defendant upon finding that FirstComp complied with § 48-144.03 and, therefore, did not carry workers' compensation insurance for appellee J.J. Hooligan's, LLC, formerly known as Pies & Pints, LLC, at the time of appellant Lori Greenwood's injury. We conclude the compensation court erred in finding that FirstComp provided sufficient evidence of its compliance with the notice

of cancellation requirement in § 48-144.03 and in dismissing FirstComp as a party. Therefore, we reverse, and remand for further proceedings.

## FACTS

On January 14, 2012, Greenwood was injured while acting in the scope and course of her employment with J.J. Hooligan's. One of the owners of J.J. Hooligan's provided Greenwood with J.J. Hooligan's insurance carrier's contact number. After calling the contact number provided, Greenwood received a return call and was informed that because of nonpayment, FirstComp was not the workers' compensation insurance carrier on the date of the accident.

Greenwood subsequently filed a petition against J.J. Hooligan's and FirstComp, seeking workers' compensation benefits. FirstComp moved to dismiss, arguing that it was not a proper party, because it had notified J.J. Hooligan's prior to January 2012, in compliance with § 48-144.03, that it had terminated its insurance coverage for nonpayment of its premium and, therefore, did not provide workers' compensation insurance to J.J. Hooligan's on the date of the accident.

At the hearing, the compensation court admitted three exhibits from FirstComp that were relevant to the motion to dismiss. Exhibit 1 contained an affidavit of Mandy Johnson, a FirstComp employee, which stated that on November 2, 2011, a notice of cancellation of workers' compensation insurance policy No. WC0124824-01 was sent by certified mail to J.J. Hooligan's for nonpayment; that FirstComp uses an electronic mailing system through the U.S. Postal Service (USPS) to send its certified mail; that the certified mail number generated by the USPS was 9171999991703112609757; that because the mailing was completed through an electronic mailing system, there was no physical receipt or ticket produced; and that the USPS keeps records of certified mailings for a period of 2 years and the system that FirstComp uses, through the USPS, keeps records for a period of 3 years.

Attached to the affidavit were an internal spreadsheet record of FirstComp which showed that notice was sent on November 3, 2011, for policy No. WC0l24824-01 and a copy of the notice of cancellation.

Exhibit 2 contained the proof-of-coverage pages from the Nebraska Workers' Compensation Court showing that cancellation was received by the compensation court in November 2011 and that the policy was canceled November 19, 2011.

Exhibit 3 included an affidavit from another FirstComp employee and a copy of J.J. Hooligan's installment payment activity. The employee's affidavit stated that he had personal knowledge of FirstComp procedures for canceling coverage and J.J. Hooligan's account information and that a cancellation notice for policy No. WC0124824-01 was sent to J.J. Hooligan's on November 2, 2011, for nonpayment of premium since July 14, 2011. It also stated that no payment of the premium was received after notice of cancellation was sent, so the cancellation became effective November 19.

The compensation court found that there was sufficient evidence to establish that FirstComp timely sent a notice of cancellation to J.J. Hooligan's by certified mail. It cited Johnson's affidavit stating that the notice of cancellation had been sent, the fact that a certified mail tracking number had been created for the notice of cancellation, and the fact that FirstComp provided notice of cancellation to the compensation court. Accordingly, the compensation court ruled that J.J. Hooligan's insurance coverage through FirstComp was canceled on November 19, 2011. As a result, the compensation court dismissed FirstComp as a defendant, because it was not a proper party. Greenwood appealed.

## ASSIGNMENTS OF ERROR

Greenwood asserts, restated, that the compensation court erroneously found that (1) FirstComp proved that it had complied with § 48-144.03's notification requirements and (2) FirstComp was not liable to Greenwood, because it was not

J.J. Hooligan's workers' compensation insurance carrier on January 14, 2012.

## STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[1]

[2] Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.[2]

## ANALYSIS

FirstComp contends that it was not J.J. Hooligan's workers' compensation insurance carrier at the time of Greenwood's accident, because it had canceled the policy for nonpayment of premium, under the requirements of § 48-144.03. It argues that its evidence of a certified mail tracking number, the testimony of two employees, and the fact that it provided notice of cancellation to the compensation court proves that it provided sufficient evidence for the compensation court to find in its favor.

Greenwood contends that FirstComp neither entered a return receipt into evidence nor provided evidence of an office practice for sending mail. She asserts that the existence of a tracking number does not itself prove that the notice of cancellation was actually mailed. Accordingly, she contends that

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[1] *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016).

[2] *Id.*

there is a genuine issue of fact regarding whether the notice of cancellation was sent to J.J. Hooligan's.

Section 48-144.03 prescribes the requirements for a notice of cancellation of workers' compensation insurance policies. It states that "coverage under a workers' compensation insurance policy shall continue in full force and effect until notice is given in accordance with this section."[3] Regarding the cancellation of a policy within the policy period, it states that "[n]o cancellation . . . shall be effective unless notice of the cancellation is given by the workers' compensation insurer to the Nebraska Worker's Compensation Court and to the employer."[4] Finally, the statute states:

> The notices required by this section shall be provided in writing and shall be deemed given upon the mailing of such notices by certified mail, except that notices from insurers to the compensation court may be provided by electronic means [and] shall be deemed given upon receipt and acceptance by the compensation court.[5]

[3,4] Unlike a notice of cancellation sent to the compensation court by electronic means, there is no requirement in § 48-144.03 that a notice of cancellation sent by certified mail actually be received by the employer. Thus, there is no requirement that a return receipt be executed by the employer. Instead, to show compliance with § 48-144.03, the insurer need only prove that it sent the notice of cancellation by certified mail to the employer.

[5] When an insurance carrier is statutorily required to provide notice of cancellation before terminating a policy, the burden of establishing an effective cancellation before a loss is on the insurer.[6]

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[3] § 48-144.03(1).

[4] § 48-144.03(2).

[5] § 48-144.03(10).

[6] *Barnes v. American Standard Ins. Co. of Wis., ante* p. 331, 900 N.W.2d 22 (2017).

[6,7] A party may prove it has mailed an item by "direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository."[7] However, we have also stated:

> "[A]bsent direct proof of actual deposit with an authorized U.S. Postal Service official or in an authorized depository[,] . . . proof of a course of individual or office practice that letters which are properly addressed and stamped are placed in a certain receptacle from which an authorized individual invariably collects and places all outgoing mail in a regular U.S. mail depository and that such procedure was actually followed on the date of the alleged mailing creates an inference that a letter properly addressed with sufficient postage attached and deposited in such receptacle was regularly transmitted and presents a question for the trier of fact to decide."[8]

In *Houska v. City of Wahoo*,[9] we considered the statutory requirement that a county judge transmit an appraisal report to a condemnee—by personal delivery or the sending by ordinary mail—within 10 days of receiving it. A defendant introduced an affidavit of a judge, stating that the judge had sent the report in a prepaid envelope addressed to the plaintiffs and placed it in either a USPS depository or the Saunders County Court outgoing mail box.[10] We held that this evidence was insufficient as a matter of law to prove the report was properly mailed.[11]

In *Baker v. St. Paul Fire & Marine Ins. Co.*,[12] we considered whether a plaintiff who claimed to have mailed her

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[7] *Houska v. City of Wahoo*, 235 Neb. 635, 641, 456 N.W.2d 750, 754 (1990).

[8] *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 18, 480 N.W.2d 192, 197 (1992), citing *Houska, supra* note 7.

[9] *Houska, supra* note 7.

[10] *Id.*

[11] *Id.*

[12] *Baker, supra* note 8.

final premium installment was entitled to a receipt-of-mail presumption, which required a showing that the premium was properly mailed. The plaintiff testified that she deposited the stamped and preaddressed envelope in the mail chute at her office building.[13] Although she testified that the mail chute led to the building's mailroom, she provided

> no evidence that the mailroom was operated under the auspices of the U.S. Postal Service or that it was a U.S. Postal Service depository. Neither was there any evidence . . . that an authorized individual invariably collected and placed all outgoing mail collected from the mailroom in a regular U.S. mail depository or that such a procedure was actually followed on [that day].[14]

Accordingly, we held that the plaintiff failed to prove as a matter of law that she had properly mailed her premium payment.[15]

The affidavit of Johnson states that the notice of cancellation was sent via certified mailed and provides a tracking number for the notice. However, Johnson did not testify to having delivered the notice of cancellation to a USPS official or depository. Additionally, we recently stated that a tracking number alone does not establish certified mail service.[16]

Further, we agree with Greenwood that FirstComp has not provided sufficient proof of a course of office practice to send cancellation notices. FirstComp asserts that the fact that it uses an electronic mailing system through USPS is proof of its course of office practice. However, FirstComp failed to make any description of what its electronic mailing system entails. From the record, we cannot discern how the electronic system sends a notice of cancellation by certified mail.

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[13] *Id.*

[14] *Id.* at 18, 480 N.W.2d 197.

[15] *Id.*

[16] See *Barnes, supra* note 6.

It is not our intent to discourage the use of electronic mailing systems, but a party is still required to adduce sufficient evidence to detail what its electronic mailing system involves. Testimony as to how an electronic mailing system produces such notices and sends them by certified mail would provide proof that a notice was sent in compliance with § 48-144.03.

Accordingly, we hold that there is not sufficient competent evidence in the record to show that FirstComp complied with its statutory duty to send J.J. Hooligan's a notice of cancellation by certified mail before terminating its policy. Therefore, the court erred in granting FirstComp's motion to dismiss.

[8] Because we have determined the compensation court erred in sustaining FirstComp's motion to dismiss, we need not address Greenwood's argument that the court erred in not considering an adverse inference based on spoliation regarding the notice. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[17]

## CONCLUSION

FirstComp failed to present sufficient competent evidence as to whether it complied with the employer notice of cancellation requirement in § 48-144.03 to warrant an order of dismissal. Accordingly, the compensation court erred in sustaining the motion to dismiss in favor of FirstComp. We, therefore, reverse the compensation court's order and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

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[17] *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017).

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

# Michael Marvin Dugan, appellant, v. State of Nebraska et al., appellees.

900 N.W.2d 528

Filed August 11, 2017. No. S-16-421.

1. **Actions: Habeas Corpus: Collateral Attack: Appeal and Error.** As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, Is the judgment in question void?
2. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below.
3. **Habeas Corpus: Judgments: Convictions: Collateral Attack.** Habeas corpus is a proper means of collaterally attacking the validity of an allegedly void judgment of conviction.
4. **Judgments: Jurisdiction: Final Orders: Appeal and Error.** An appeal is not perfected and an appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction by appealing from a final order or a judgment.
5. **Final Orders: Appeal and Error.** An order is final for purposes of appeal under Neb. Rev. Stat. § 25-1902 (Reissue 2016) if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
6. **Criminal Law: Pretrial Procedure: Appeal and Error.** Generally, for a pretrial order in criminal cases to be immediately appealable, it must involve a right not to be tried as opposed to a right not to be convicted.
7. **Final Orders: Pleadings.** How a motion should be regarded for purposes of determining whether its denial is a final order depends upon the substance of the motion and not its title.
8. **Arrests: Extradition and Detainer: Trial.** The unlawfulness of the means of arrest or extradition from another state does not impair the power of a court to try an accused.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellees.

Heavican, C.J., Wright, Miller-Lerman, Stacy, Kelch, and Funke, JJ.

Wright, J.

## NATURE OF CASE

Trial proceeded while the defendant's appeal from the denial of his motion for absolute discharge was pending with the Nebraska Court of Appeals. The motion was based on the allegations that the defendant's arrest warrant was defective and that his extradition was procedurally improper. After the defendant was convicted and sentenced, the appeal from the denial of the motion for absolute discharge was voluntarily dismissed. The conviction and sentence were affirmed on direct appeal. In his action for habeas corpus relief, the defendant now claims that the trial court lacked jurisdiction to continue with his trial while his appeal from the denial of the motion for absolute discharge was pending. He therefore asserts that his conviction and sentence are void.

## BACKGROUND

### Underlying Charges

Michael Marvin Dugan was arrested in Wyoming under what the sheriff's department believed to be a valid Nebraska warrant, but the warrant was not issued until after Dugan was taken into custody. Dugan waived extradition and was returned to Nebraska. In July 2006, Dugan was charged in the district court for Cheyenne County (the trial court) with one count of theft by unlawful taking.

## Excessive Bail Appeal

Dugan moved to reduce his bail pending trial, alleging it was excessive. The motion was overruled. On May 25, 2007, Dugan appealed the denial of his motion to reduce his bail to the Court of Appeals.

On June 21, 2007, the Court of Appeals dismissed the appeal for lack of jurisdiction, explaining that under *State v. Kula*,[1] the order appealed from was not final. The mandate of dismissal issued on July 27 and was filed with the trial court on August 2.[2]

## Federal Habeas Action

On June 26, 2007, Dugan filed an application for a writ of habeas corpus in the U.S. District Court for the District of Nebraska. The application alleged that his arrest warrant was defective and that he was extradited without proper procedure. Dugan further alleged that his bail was excessive and that the trial court had erred in refusing to stay the criminal proceedings pending his appeal of the allegedly excessive bail. Dugan asked the federal district court to stay his trial and determine the legality of his restraint, as well as to fix a reasonable bail.

## Absolute Discharge Motion and Appeal

While the federal habeas action was still pending, Dugan filed with the trial court a motion for absolute discharge for violation of his constitutional rights. Dugan alleged that his arrest warrant was defective and that his extradition was procedurally improper. The trial court denied the motion, and on October 3, 2007, Dugan appealed to the Court of Appeals.

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[1] *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

[2] See *State v. Dugan*, 15 Neb. App. lxxxix (No. A-07-584, June 21, 2007).

### Trial Verdict

Trial proceeded while Dugan's federal habeas action and his appeal to the Court of Appeals from the denial of his motion for absolute discharge were pending. Dugan was found guilty on October 5, 2007, and was sentenced as a habitual criminal on December 14. He was committed to the Department of Correctional Services on December 17.

### Voluntary Dismissal of Absolute Discharge Appeal

On January 10, 2008, Dugan filed a stipulation jointly with the State to dismiss his appeal to the Court of Appeals of the district court's denial of his motion for absolute discharge, for the reason that it was interlocutory. The mandate of dismissal issued on January 16.

### Direct Appeal

On direct appeal from his conviction and sentence, Dugan presented 23 assignments of error. They included allegations that he was illegally arrested and improperly extradited. The Court of Appeals affirmed the conviction and sentence. With regard to the arrest and extradition, the Court of Appeals stated that considerations as to the method of obtaining jurisdiction over a criminal defendant were not relevant to the power of a court to try an accused. We denied Dugan's petition for further review.

### State Habeas Action

After his direct appeal was unsuccessful, Dugan filed an application in the district court for Lancaster County for a writ of habeas corpus. Dugan alleged that his conviction and sentence were void because his trial had occurred while the court was divested of jurisdiction due to the pendency of his appeals from the denial of his motion for discharge and from the denial of his motion to reduce excessive bail.

The court dismissed with prejudice Dugan's application for a writ of habeas corpus relief. As to the court's jurisdiction during the pendency of the bail appeal, the court reasoned that because the Court of Appeals never acquired jurisdiction over the interlocutory appeal of the nonfinal order, the trial court never lost jurisdiction. As to the court's jurisdiction during the pendency of the absolute discharge appeal, the court similarly said that the arrest and extradition issues presented in the absolute discharge motion did not affect a substantial right. Therefore, the order was not final and the interlocutory appeal therefrom did not deprive the trial court of jurisdiction.

Dugan appeals the dismissal of his habeas action.

## ASSIGNMENTS OF ERROR

Dugan assigns that the district court erred in denying habeas corpus relief because (1) his sentence is void because the trial court tried, convicted, and sentenced him during the pendency of an appeal that divested the trial court of jurisdiction and (2) the Court of Appeals erred in citing the wrongly decided case *State v. Kula* and failed to properly exercise its jurisdiction to hear Dugan's appeal from the trial court's order denying his motion to reduce excessive bail.

## STANDARD OF REVIEW

[1] As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, Is the judgment in question void?[3]

[2] To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below.[4]

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[3] *Garza v. Kenney*, 264 Neb. 146, 646 N.W.2d 579 (2002).

[4] *Id.*

## ANALYSIS

Before we moved the case to our docket, the Court of Appeals summarily rejected Dugan's second assignment of error, that he was entitled to habeas corpus relief because the trial court was divested of jurisdiction during the pendency of his appeal from the motion to reduce bail. We also summarily reject Dugan's second assignment of error. We next address Dugan's assignment of error that he was entitled to habeas corpus relief because the trial court lacked jurisdiction during the pendency of his appeal from the denial of his motion for absolute discharge.

[3] Habeas corpus is a proper means of collaterally attacking the validity of an allegedly void judgment of conviction.[5] Nebraska case law generally holds that once an appeal has been perfected, the trial court is divested of its jurisdiction to hear a case involving the same matter between the same parties.[6] And with the exception of limited acts of continuing jurisdiction not applicable here, all proceedings in the district court while a perfected appeal is pending are void for lack of jurisdiction.[7]

[4] But an appeal is not perfected and an appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction by appealing from a final order or a judgment.[8] In a criminal case, the

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[5] See, *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994); Neb. Rev. Stat. § 29-2801 (Reissue 2008).

[6] *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017).

[7] See, *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999); *State v. Moore*, 186 Neb. 71, 180 N.W.2d 888 (1970); *Jenkins v. Campbell*, 76 Neb. 138, 107 N.W. 221 (1906). Compare, e.g., *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

[8] See *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

judgment is the sentence.[9] The question here is whether the trial court's denial of Dugan's motion for absolute discharge was a final order.

[5] An order is final for purposes of appeal under Neb. Rev. Stat. § 25-1902 (Reissue 2016) if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[10]

Numerous factors determine when an order affects a substantial right for purposes of appeal.[11] Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue.[12] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[13]

We have said that an order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.[14] We have also said that in order for the order to have a substantial effect on the substantial right, it is fundamental that the right is significantly undermined or irrevocably lost by postponing appellate review.[15]

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[9] *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). See, also, *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

[10] *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017).

[11] *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

[12] *Id.*

[13] *Id.*

[14] See *State v. Bluett*, 295 Neb. 369, 889 N.W.2d 83 (2016).

[15] See *id*. See, also, e.g., *In re Interest of Sandrino T.*, 295 Neb. 270, 888 N.W.2d 371 (2016).

Though Dugan characterized his motion as a motion for absolute discharge, motions for absolute discharge are made on speedy trial grounds.[16] Section Neb. Rev. Stat. § 29-1208 (Reissue 2008) mandates:

> If a defendant is not brought to trial before the running of the time for trial as provided for in [the speedy trial act] . . . he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.

We have held that to the extent Nebraska's speedy trial statutes[17] confer a right to a speedy trial and authorize a special application to obtain judicial enforcement of that right, a ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is a ruling affecting a substantial right made during a special proceeding and is therefore final and appealable.[18] We have reasoned that the ruling on

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[16] See, e.g., *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014); *State v. Brooks*, 285 Neb. 640, 828 N.W.2d 496 (2013); *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009); *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004); *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997); *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991); *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972); *State v. Johnson*, 22 Neb. App. 747, 860 N.W.2d 222 (2015); *State v. Vela-Montes*, 19 Neb. App. 378, 807 N.W.2d 544 (2011); *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008); *State v. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008); *In re Interest of Britny S.*, 11 Neb. App. 704, 659 N.W.2d 831 (2003); *State v. Castillo*, 11 Neb. App. 622, 657 N.W.2d 650 (2003); *State v. Washington*, 11 Neb. App. 598, 658 N.W.2d 302 (2003); *State v. Hayes*, 10 Neb. App. 833, 639 N.W.2d 418 (2002); *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002).

[17] Neb. Rev. Stat. §§ 29-1201 to 29-1209 (Reissue 2008).

[18] See, *State v. Williams, supra* note 16; *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Gibbs, supra* note 16.

a motion to discharge affects a substantial right, because the rights conferred on an accused criminal by §§ 29-1207 and 29-1208 would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence. We have compared this to the manner in which rights of an accused criminal would be undermined if appellate review of the denial of a plea in bar in double jeopardy claims were postponed until after conviction and sentence.[19]

[6] We have explained that both involve a right not to be tried.[20] This is in line with federal decisions that generally hold in criminal cases that in order for a pretrial order to be immediately appealable, it must involve a right not to be tried as opposed to a right not to be convicted.[21]

We have also noted that an interlocutory appeal based on a claimed denial of statutory speedy trial rights involves a relatively simple mathematical computation of whether the 6-month speedy trial clock, as extended by statutorily excludable periods, has expired prior to the commencement of trial.[22]

[7] Dugan's motion for absolute discharge based on the alleged unlawfulness of his arrest and extradition bears no resemblance to a motion for absolute discharge based on the statutory right to a speedy trial. How a motion should be regarded for purposes of determining whether its denial is a final order depends upon the substance of the motion and not its title.[23]

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[19] *Id.*

[20] See *State v. Williams, supra* note 16.

[21] See, e.g., *Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984); *U.S. v. Saccoccia*, 18 F.3d 795 (9th Cir. 1994).

[22] See *State v. Williams, supra* note 16.

[23] See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

In *State v. Loyd*,[24] we held that the denial of the defendant's motion to quash based on a statute of limitations defense, which the defendant had styled as a "'motion to discharge,'" was not a final order. We explained that the denial of that motion did not diminish a defense previously available to him, because he could continue to challenge through his not guilty plea the sufficiency of the evidence to prove that the charges were filed within the period specified by the applicable statute of limitations.[25]

[8] Similarly, we will not treat this motion as one for absolute discharge simply because of its title. And, as the Court of Appeals discussed in its opinion on direct appeal, the allegations in Dugan's motion could not legally support absolute discharge. The unlawfulness of the means of arrest or extradition from another state does not impair the power of a court to try an accused.[26] The allegations of unlawful arrest and extradition do not involve a right not to be tried.

Rather, the illegality of an arrest gives rise only to "collateral" rights and remedies in the underlying criminal action, such as the exclusionary rule.[27] Those collateral rights and remedies are effectively vindicated on appeal from the judgment.[28] Other rights at issue in an allegedly unlawful arrest

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[24] *Id*. at 770, 696 N.W.2d at 868.

[25] See *State v. Loyd, supra* note 23. See, also, *State v. Nuss*, 235 Neb. 107, 454 N.W.2d 482 (1990).

[26] See, *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *State v. Smith*, 207 Neb. 263, 298 N.W.2d 162 (1980); *State v. Knudsen*, 201 Neb. 584, 270 N.W.2d 926 (1978); *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977); *Maddox v. Sigler*, 181 Neb. 690, 150 N.W.2d 251 (1967); *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946). See, also, *Pettibone v. Nichols*, 203 U.S. 192, 27 S. Ct. 111, 51 L. Ed. 148 (1906); *Mahon v. Justice*, 127 U.S. 700, 8 S. Ct. 1204, 32 L. Ed. 283 (1888).

[27] *State v. Masat*, 239 Neb. 849, 852, 479 N.W.2d 131, 133 (1992).

[28] See cases cited *supra* note 26.

or extradition may be vindicated through a civil rights action under 42 U.S.C. § 1983 (2012).[29]

Simply put, the trial court's ruling pertaining to the allegations of unlawful arrest and extradition in Dugan's motion for absolute discharge did not affect the subject matter of the underlying criminal litigation. As such, the district court's order did not affect a substantial right. The order, therefore, was not final, and Dugan's interlocutory appeal therefrom did not deprive the trial court of jurisdiction to proceed with Dugan's trial, conviction, and sentencing.

The district court correctly denied Dugan's application for a writ of habeas corpus relief. We find no merit to Dugan's contention that the underlying criminal judgment against him was void. Because the trial court's denial of his motion for absolute discharge was not a final order, the trial court was not divested of jurisdiction when Dugan filed this interlocutory appeal.

## CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

Cassel, J., participating on briefs.

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[29] See, Annot., 45 A.L.R. Fed. 871 (1979); Annot., 1 A.L.R. Fed. 519 (1969).

Nebraska Supreme Court
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# In re Estate of Cora H. Etmund, deceased. Jean Holubar et al., appellants, v. Cheryl A. Brown, Personal Representative of the Estate of Cora H. Etmund, deceased, appellee.

900 N.W.2d 536

Filed August 11, 2017. No. S-16-804.

1. **Decedents' Estates: Judgments: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Decedents' Estates: Wills: Trusts: Judgments: Appeal and Error.** The interpretation of the words in a will or a trust presents a question of law. When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
4. **Decedents' Estates: Wills: Intent.** The cardinal rule concerning a decedent's will is the requirement that the intention of the testator shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.
5. ____: ____: ____. To arrive at a testator's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.

6. **Wills.** When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible.
7. **Wills: Words and Phrases.** Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
8. **Uniform Commercial Code: Sales.** The issue of whether a sale was commercially reasonable under the Uniform Commercial Code is a question of fact for the fact finder to decide.
9. **Trial: Witnesses: Evidence: Appeal and Error.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.

Appeal from the County Court for Lancaster County: Holly J. Parsley, Judge. Affirmed.

Daniel E. Klaus and Sheila A. Bentzen, of Rembolt Ludtke, L.L.P., for appellants.

Reginald S. Kuhn and Christina L. Usher, of Mattson Ricketts Law Firm, for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

## I. INTRODUCTION

This case involves a dispute as to whether the personal representative of the estate of Cora H. Etmund (Etmund), deceased, should be removed pursuant to Neb. Rev. Stat. § 30-2454 (Reissue 2016).

Etmund's will directed the personal representative of her estate, Cheryl A. Brown, to provide the current farm tenant, Norris Talcott, with the first opportunity to purchase the subject property "under commercially reasonable terms and conditions as he and [Etmund's] personal representative may agree."

Brown hired a certified appraiser, who valued the subject property at $785,859 based on its agricultural use. Brown thereafter entered into a purchase agreement for the subject property with the current farm tenant for $900,000. Jean Holubar; Paul Etmund; Dale Etmund, Sr.; and Diane Geistlinger (petitioners), all of whom are devisees under the will, argue that a sale at this price is not in the best interests of the estate because, according to their appraiser, the value of the land is $1,457,000 based on the "highest and best use" for the subject property as a residential development with interim agricultural use.[1] Petitioners thereafter filed a petition for removal.

The county court denied petitioners' petition for removal. Petitioners appeal. We affirm.

## II. BACKGROUND

### 1. Factual Background

Etmund died on March 2, 2015. Etmund had a validly executed will dated May 24, 2013. On March 17, 2015, Brown filed an application for informal probate of will and appointment of personal representative. Brown requested that she be appointed to serve as personal representative. That same day, the county court appointed Brown as personal representative of the estate.

Etmund's will states in relevant part:

> A. I nominate and appoint . . . Brown as personal representative of my estate. . . .
>
> B. My personal representative shall have full power in her discretion to do any and all things necessary for the complete administration of my estate, including the power to sell at public or private sale, without order of court, any real or personal property belonging to my estate, and to compromise or otherwise settle or adjust

[1] Brief for appellants at 14.

> any and all claims, charges, debts, and demands whatever against or in favor of my estate as fully as I could do if living.
>
> C. I direct my personal representative to provide my current farm tenant, . . . Talcott, the first opportunity to purchase the real estate owned by me under commercially reasonable terms and conditions as he and my personal representative may agree, it being my desire that . . . Talcott be given the opportunity to purchase said real estate before any other. If . . . Talcott does not wish to purchase said real estate or if he and my personal representative are unable to come to mutual terms of agreement for its sale, then my personal representative is directed to sell said real estate either by private or public sale.

At the time of Etmund's death, the subject property was used as agricultural land and zoned as agricultural. The personal representative hired an appraiser to conduct an appraisal of the subject property. The appraiser valued the property at $785,859, based on its agricultural use. Brown testified that after receiving the appraisal price, she negotiated the purchase price with Talcott. After thinking about it for "a couple days," Talcott accepted the offer. On November 18, 2015, Brown, acting in her capacity as personal representative, entered into an agreement for sale of the subject property with Talcott and his wife for a price of $900,000.

On January 7, 2016, pursuant to Neb. Rev. Stat. § 30-2450 (Reissue 2016) of Nebraska's Uniform Probate Code, petitioners sought an order restraining the personal representative from closing on the sale of the real estate. Petitioners contended that the agreement provided for a sale price that was "significantly below fair market value."

Following a hearing, on January 13, 2016, the county court filed an order restraining the personal representative, stating that the sale would "unreasonably jeopardize the interest of

. . . Petitioners" and restraining Brown from closing on the sale until March 1. Petitioners were given until March 1 to complete their investigation as to a commercially reasonable sale.

Pursuant to the court's order, petitioners hired a licensed real estate appraiser to do an appraisal of the subject property. Petitioners' appraiser testified that the total value of the property was $1,457,000 and determined that the "highest and best use [was] residential development with interim agricultural use." Petitioners filed a certification of completion of investigation as to commercially reasonable sale and stated that according to their appraisal report, the subject property had a value that exceeded the price at which Brown agreed to sell it by $557,000.

Petitioners also filed a petition for formal probate of the will, determination of heirs, and appointment of successor copersonal representatives after removal of the personal representative; for accounting by personal representative; and for accounting by agent under power of attorney. The petition stated that "it is in the best interests of the Estate that Dale Etmund, Sr. and Jean Holubar be appointed as Successor Co-Personal Representatives of the Estate." Following a hearing, the county court denied the petition. Petitioners appeal.

### 2. Testimony in Support of Appraisals

#### (a) Appraiser for Petitioners

The appraiser hired by petitioners testified that the "highest and best use analysis is the cornerstone of any appraisal." Using this analysis, petitioners' appraiser testified that the highest and best use of the subject property was residential development with interim agricultural use, because he "saw that there was potential there." He reasoned, "[Y]ou can . . . divide [the] property by 20 acres, . . . clump those together in

what is called a Community Unit Plan, . . . [build] houses in one area, and then the rest of it is then restricted use until . . . you would have a zoning change." He stated that he had seen this approach done "multiple times" in the corridor in which the property is located.

However, in the report he gave to petitioners, the appraiser cited to a map in evidence entitled "2040 Priority Growth Areas." In explaining the map, petitioners' appraiser stated that "[t]he tiers, as they are laid out, [are] where [the Lancaster County Engineer] anticipate[s] . . . the city could potentially grow. This is completely based on drainage basins for sewer." The subject property is in "Tier II," which, according to the accompanying text on the map, indicates that the city anticipates development will occur in approximately 2060, based on when the sewer is projected to reach the property. In his report, petitioners' appraiser stated that based on other developments in the area, including the projected construction of a "South Beltway," he "estimate[d] the city will expand to the subject property and the subject property will include city services much sooner than 2060." However, the report does not specify by which year that might occur. There was no testimony explaining the discrepancy in the estimates of when city services will be available.

As part of his analysis, petitioners' appraiser also looked at comparable sales in the surrounding area, but he admitted that some of these sales were in "probably better areas." He further testified, "I had the high end, I had the low end, and somewhere in the middle, . . . and it gives me a good idea of where I believe it should fall."

Petitioners' appraiser incorporated into his testimony of the total valuation the valuation of the house and surrounding 4.59 acres performed by a certified appraiser at the same appraisal company. By viewing comparable sales, this appraiser valued the house and surrounding 4.59 acres at $110,000 and characterized the home as being in "fair condition."

### (b) Appraiser for Personal Representative

The appraiser hired by Brown to appraise the property was a licensed general certified appraiser, real estate broker, and crop insurance agent. In reaching his appraisal value, Brown's appraiser testified that he inspected the property and "used the three approaches to value: the sales comparison approach, the income approach, and the cost approach." He determined that "the highest and best use is agriculture, dry land row crop reduction, and cattle grazing." Brown's appraiser further stated that "another highest and best use of the subject property was rural residential acreage use" for the part of the property with a building site and improvements. Brown's appraiser testified that he assigned a value to the land for agricultural use and that he did not consider himself competent under the Uniform Standards of Professional Appraisal Practice to appraise property for development.

Brown's appraiser testified that he considered other uses of the property besides agriculture, but explained:

> [A]s I looked at it from a feasible standpoint, I felt what the — what a potential buyer would pay for land . . . it wasn't financially feasible because by the time you do the development cost in it, and then I researched the market to see what three- to five-acre tracts of land were selling for, there wasn't enough profit margin in my opinion for a developer to take that risk.

In his appraisal, Brown's appraiser relied on comparable sales with a similar type of cropland soil quality. He characterized the home as "poor condition," noting that it had been vacant since about 2009. He also estimated the building site to be 5 acres, valued the building and site improvements at $83,450, and stated that in his opinion, the value of the subject property was $785,859. He further testified that he conducted the appraisal in accordance with the Uniform Standards of Professional Appraisal Practice.

## III. ASSIGNMENT OF ERROR

Petitioners assign, restated, that the county court erred in finding that petitioners did not show cause for removal of Brown as personal representative of the estate.

## IV. STANDARD OF REVIEW

[1] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

[2] The interpretation of the words in a will or a trust presents a question of law. When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.[4]

[3] The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.[5]

## V. ANALYSIS

Petitioners contend that Brown failed to sell the property "under commercially reasonable terms and conditions" as directed by the will, and thus removal is in the best interests of the estate. Petitioners argue that the will directs Brown "to arrive at a commercially reasonable price or value, which, in the case of real estate, means valuing land at its highest and best use"[6] of commercial developmental property with interim agricultural use.

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[2] *In re Estate of Nemetz*, 273 Neb. 918, 735 N.W.2d 363 (2007).

[3] *Id.*

[4] *In re Estate of Shell*, 290 Neb. 791, 862 N.W.2d 276 (2015).

[5] *In re Estate of Webb*, 20 Neb. App. 12, 817 N.W.2d 304 (2012).

[6] Brief for appellants at 10.

Section 30-2454(b) provides that "[c]ause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative . . . has mismanaged the estate or failed to perform any duty pertaining to the office."

Section 30-2450(a) provides in relevant part:

> On petition of any person who appears to have an interest in the estate, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement, or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

And Neb. Rev. Stat. § 30-2464(a) (Reissue 2016) states that a personal representative is "under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate."

[4,5] The cardinal rule concerning a decedent's will is the requirement that the intention of the testator shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.[7] To arrive at a testator's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical

[7] *In re Estate of Ritter*, 227 Neb. 641, 419 N.W.2d 521 (1988).

meaning of words used in the will, and assume that the maker of the will understood words stated in the will.[8]

### 1. "Commercially Reasonable"

Rather than address the term "commercially reasonable" in a vacuum, as petitioners' argument suggests, this court must examine Etmund's will in its entirety. The phrase "commercially reasonable terms" is used in the will to refer to negotiations for sale of the property between the personal representative and Talcott.

[6,7] When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible.[9] Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.[10]

According to Etmund's will, Brown, as personal representative, has "full power in her discretion . . . to sell at public or private sale, without order of court, any real or personal property belonging to [Etmund's] estate."

As mentioned above, Talcott is a current tenant who farms the property at issue. According to Brown's testimony, Etmund inherited the property from a brother in 2002. Talcott has been one of the farm tenants on the property since 1993, when Etmund's brother owned the property. The will directs the personal representative to provide the "current farm tenant, . . . Talcott," with the first opportunity to purchase the property. Such characterization of Talcott in the will indicates that Etmund's intent was to provide Talcott an opportunity to continue to pursue his livelihood of farming on the property, which he had been doing prior to Etmund's ownership of the property.

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[8] *Id.*

[9] *Id.*

[10] *Id.*

The will further directs that "Talcott be given the opportunity to purchase said real estate before any other" and states, "If . . . Talcott does not wish to purchase said real estate or if he and my personal representative are unable to come to mutual terms of agreement for its sale, then my personal representative is directed to sell said real estate either by private or public sale." Therefore, other passages in the will provide a basis for the county court's finding that "commercially reasonable terms and conditions" are between the personal representative and the tenant farmer.

While, as petitioners argue, the will does not explicitly state that the property must be sold as agricultural property, the testator's intent of such a sale can be discerned from the rest of the sentence quoted above and the sentences following it. In contrast, nowhere in the will does Etmund state that she desires the highest price or the best use for the property; nor does the rest of the will support that reading.

Petitioners cite *In re Estate of Webb*[11] and *Reeves v. Associates Financial Services Co., Inc.*,[12] for the proposition that a personal representative should be removed if he or she attempts to sell the decedent's home at a price lower than the appraiser's value. We find that both of those cases involve different factual scenarios and are not applicable to the current set of facts.

[8,9] Furthermore, this court has held that the issue of whether a sale was commercially reasonable under the Uniform Commercial Code is a question of fact for the fact finder to decide.[13] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the

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[11] *In re Estate of Webb, supra* note 5.

[12] *Reeves v. Associates Financial Services Co., Inc.*, 197 Neb. 107, 247 N.W.2d 434 (1976).

[13] See *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990).

weight to be given their testimony. An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.[14]

In this case, the county court had to determine whether the price of $900,000 was commercially reasonable for the property based on two competing appraisals. The county court was presented with the appraisals, weighed the evidence, evaluated the credibility of the witnesses, and found Brown's appraiser to be more credible.

In light of the surrounding language in the will, its phrase "commercially reasonable terms" could not reasonably be interpreted as meaning the "highest and best" use of residential development.[15] As this is a question of law, we conclude that the term "commercially reasonable" as used in the will is not susceptible to two reasonable interpretations or meanings and is thus not ambiguous. Furthermore, we hold that the county court did not clearly err in its factual findings that "commercially reasonable" was not ambiguous and that Brown sold the property "under commercially reasonable terms and conditions" to Talcott in selling it at a price based on the appraisal by a certified appraiser who valued the property as agricultural use.

### 2. Personal Representative's Discretion With Respect to Appraisals

We turn next to petitioners' contention that Brown's appraiser was not qualified to appraise the land at issue, and by extension that Brown should be removed as personal representative for hiring that appraiser and adopting his appraisal.

Neither party contends that the purpose of the will is contrary to a rule of law or public policy. As such, this court is

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[14] *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

[15] See brief for appellants at 10.

concerned only with giving effect to the intent of the testator.[16] Etmund's will gives broad discretion to Brown as personal representative. Brown employed both a general certified appraiser and an attorney to advise her in the performance of her administrative duties and acted upon their recommendations. This she is allowed to do. Neb. Rev. Stat. § 30-2476 (Reissue 2016) provides that except when otherwise restricted by the will, the personal representative, "acting reasonably for the benefit of the interested persons," may employ persons to advise and may "act without independent investigation upon their recommendations."[17] And Neb. Rev. Stat. § 30-2468 (Reissue 2016) explicitly states that the personal representative may employ a "qualified and disinterested appraiser" to determine the fair market value of any asset of value that may be subject to reasonable doubt.

Petitioners contend that the admission by Brown's appraiser that he was not qualified to appraise development property meant he used a "limited approach" in his appraisal, thus calling into question whether he was qualified to appraise the property.[18]

As noted above, the property at issue was used as agricultural land by the current tenant and is zoned as agricultural. Brown's appraiser held a general certified appraiser's license, a real estate broker's license, and a crop insurance agent's license. He had significant experience appraising farms, particularly farms in Lancaster County. Brown's appraiser testified that he considered whether the property could be sold for residential developmental use, but determined it was not "financially feasible" based on his analysis of the profit margin for a developer. He did not appraise the land for residential development. His testimony that he was not qualified to

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[16] See *In re Estate of Ritter, supra* note 7.

[17] § 30-2476(21).

[18] Brief for appellants at 15.

appraise development property does not make him unqualified to appraise the property at issue.

Brown's appraiser's licensing, experience, and testimony indicate that he was qualified to appraise property he deemed agricultural. Furthermore, there is no testimony to indicate that Brown's appraiser had an interest in the estate. Thus, Brown's appraiser was a qualified and disinterested appraiser, and Brown was entitled to act without independent investigation into his appraisal.

The county court applied the language of § 30-2454(b) and found that no cause existed to remove Brown as personal representative. Based on an examination for error appearing on the record, we conclude that the county court's ruling conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, nor unreasonable. We further hold that the county court was not clearly erroneous in making its factual determination of the value of the property.

Petitioners' assignment of error is without merit.

## VI. CONCLUSION

For the reasons stated above, we affirm.

Affirmed.

Nebraska Supreme Court
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# State of Nebraska, appellee, v. Christian E. Phillips, appellant.

900 N.W.2d 522

Filed August 11, 2017. No. S-16-845.

1. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
2. **Judgments: Appeal and Error.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Sentences.** When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. The sentencing court is not limited to any mathematically applied set of factors.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

## INTRODUCTION

Christian E. Phillips was found guilty of a violation of the Sex Offender Registration Act (SORA). He was sentenced to 12 months' imprisonment and 12 months' supervised release. He appeals. This case presents our first opportunity to address postrelease supervision as enacted by 2015 Neb. Laws, L.B. 605. We affirm.

## FACTUAL BACKGROUND

Phillips was convicted of third degree sexual assault of a child in September 2013. Based upon that conviction, he was required to register under SORA as a 25-year registrant. Phillips received notification of that requirement and acknowledged his responsibilities under the act.

Upon release, Phillips reported a location in Sarpy County, Nebraska, as his address. Upon investigation, that address was found to be fictitious. Phillips was later discovered to be residing at a different address. He never reported this address to any sheriff's office.

Accordingly, Phillips was charged with the failure to register as required by SORA. He pled no contest pursuant to a plea agreement and was sentenced to 12 months' imprisonment and 12 months' supervised release. In connection with Phillips' supervised release, the district court set multiple conditions:

> 1. Shall not violate any laws and shall refrain from disorderly conduct or acts injurious to others.
>
> 2. Shall avoid social contact with those persons having criminal records or who are on probation or parole, except as expressly permitted by your post-release supervision/probation officer.

3. Shall report in writing and/or in person during the term of post-release supervision/probation as directed by the Court or post-release supervision/probation officer.

4. Shall truthfully answer any inquiries of the post-release supervision/probation officer and allow the post-release supervision/probation officer to visit at all reasonable times and places.

5. Shall be employed, in school or in treatment or a combination of any not less than full time, or provide proof that employment, school admission or treatment is being sought, and permission of the post-release supervision/probation officer shall be obtained before any change of employment, school or treatment.

6. Shall reside at an address provided to the post-release supervision/probation officer, and permission of the post-release supervision/probation officer shall be obtained before any change of address. Travel permits are required for any travel outside of the state of Nebraska.

7. Shall submit to search and seizure of your premises, person, or vehicle upon request of the post-release supervision/probation officer (or law enforcement officer), with or without a warrant, day or night, to determine the presence of alcoholic beverages, controlled substances or other contraband.

8. Shall not use, consume or have in your personal possession any alcoholic beverage or controlled substance (except as prescribed by a duly licensed physician or dentist) and shall submit to a chemical test of blood, breath, or urine at your expense upon request of the post-release supervision/probation officer or law enforcement officer to determine the use of alcoholic liquor or drugs. The prohibition against using, consuming and/or possessing controlled substances includes designer drugs and synthetic drugs.

9. Shall submit to random drug and alcohol testing as instructed by your post-release supervision officer but in no event fewer than 3 times per week.

10. Shall not have or associate with anyone who has possession of firearms, ammunition, or illegal weapons.

11. **FINE AND COSTS**: Shall pay:

a. Court Costs — ALL;

b. Chemical Testing: $5.00 per month to the state supervising post-release supervision office;

c. Pay a post-release supervision administrative enrollment fee of $30.00 immediately. In addition, pay a monthly post-release supervision programming fee. If supervised in Nebraska, pay a monthly fee of $25.00 per month for 12 months. Monthly post-release supervision programming fees are due and payable to the Clerk of the District Court on or before the 10th day of each month.

12. Any bond money not subject to a valid lien or assignment shall be applied to the financial obligations ordered herein. All financial obligations shall be completed no later than 30 days prior to the date of discharge from post-release supervision.

13. Shall not frequent any establishment whose primary source of business is the dispensing of alcoholic beverages.

14. Shall successfully complete an alcohol, drug, substance abuse and/or mental health evaluation and follow all recommendations for counseling or treatment at the recommended level of care, as directed by the post-release supervision/probation officer at the defendant's costs.

15. Shall attend at least 2 social support group meetings such as AA or NA per week, and obtain and maintain an AA/NA sponsor within 60 days, and verify the same with your post-release supervision/probation officer.

16. CONTINUOUS ALCOHOL MONITOR: Defendant shall be required to be equipped with and use a continuous alcohol monitoring device if directed by the post release supervision/probation officer, at the Defendant's cost.

17. Shall sign any releases necessary for continued evaluation and/or treatment of any alcohol, drug, substance abuse and/or mental health care as outlined above.

18. Shall participate in and follow the case plan developed by the post release supervision officer including, but not limited to, life skills group or educational enhancement classes, social activities, and any other programming deemed by the probation office to be of benefit to the Defendant.

19. Shall complete a sexually-based offense screening and follow any screening recommendation for evaluation or treatment as may be determined by the post release supervision officer to be reasonable and necessary for Defendant's rehabilitation.

20. Shall not use any electronic device that has access to the internet until written permission to do so is granted by the post release supervision officer.

21. To the extent Defendant has written permission to access the internet, Defendant shall comply with any limitations for such access as directed by the post release supervision officer including the installation of tracking or other software. Defendant consents, upon the request of any law enforcement officer or post release supervision officer to the examination and search of any electronic device owned or used by the Defendant. Defendant shall, on request provide law enforcement officers with all email addresses and social media identifiers of every kind or nature used by the Defendant to access any internet site. To further enable such examination or search, Defendant shall on request, provide any passwords, PINs,

access codes, web addresses, login scripts or other protocol needed to access any devices used or required to access the particular internet resource. Defendant shall not erase any internet browsing data, history or downloaded files from any electronic device.

22. Shall not use the internet for any reason unless given advanced permission by the supervising officer. If permission is granted, the defendant shall refrain from visiting or viewing any social internet site, chat room or pornographic internet site at any time. Further, the Defendant is not allowed to visit any other type of internet site in which there is interaction with other people without first identifying the site to the supervising officer and obtaining permission to utilize such site. Finally, the Defendant shall grant the officer full access to all computers to which the defendant has access upon request to confirm compliance with the prohibitions set forth herein.

23. Shall not use or possess a computer, smart phone or any other electronic device with internet access without permission of the supervising officer.

24. Shall not possess any pornographic, sexually oriented or sexually stimulating materials to include: visual, auditory, telephonic, electronic media, computer programs or services. Defendant shall not patronize any place where such material or entertainment is available. Defendant shall not utilize any sexually related telephone numbers, and may be required to submit proof of this.

25. The supervising officer may grant permission for the use of sexually oriented material only for treatment purposes.

26. Defendant shall submit to polygraph examinations as directed by the post release supervision officer at Defendant's cost.

The sentencing order additionally noted that "the Court, upon application of the supervising officer or the Defendant or upon its own Motion, may modify or eliminate any of the above conditions or add further conditions."

## ASSIGNMENTS OF ERROR

Phillips assigns that (1) his sentence was excessive and (2) certain conditions imposed were unconstitutional, "in violation of the First Amendment, Ex Post Facto protections, the Fourth Amendment and Due Process guarantees and conditions that are not reasonably related to [his] rehabilitation."

## STANDARD OF REVIEW

[1,2] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[1] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[2]

## ANALYSIS

Phillips argues that his sentence was excessive and that certain conditions imposed upon him were unconstitutional.

### Excessive Sentence—Imprisonment

Phillips, a 25-year SORA registrant, failed to register his address as required by SORA. He was convicted of that violation, a Class IIIA felony, and was sentenced to 12 months' imprisonment. He argues that this sentence was excessive.

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[1] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[2] *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017).

[3] When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. The sentencing court is not limited to any mathematically applied set of factors.[3]

As an initial matter, Phillips served 6 months on this conviction and, with good time, has since been released from imprisonment and is serving his 1-year term of postrelease supervision. In any case, however, this term of imprisonment was not excessive.

Phillips' SORA violation was a Class IIIA felony, punishable by a maximum of 3 years' imprisonment and 18 months' postrelease supervision, and/or a $10,000 fine.[4] His 1-year sentence of imprisonment was within statutory guidelines and well below the maximum.

Phillips argues that he does not have an extensive criminal record and that thus, the sentence of 1 year's imprisonment was excessive. While it might be true that Phillips does not have an extensive history, he does have at least one conviction for sexual assault—the crime that required him to register under SORA. And Phillips failed to comply with SORA. Given the nature of the charge as it related to Phillips' criminal history, we cannot conclude that this sentence was an abuse of discretion.

Phillips' first assignment of error is without merit.

## Conditions of Postrelease Supervision

Phillips also argues that the conditions of his postrelease supervision were unconstitutional in various respects. As noted

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[3] *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

[4] Neb. Rev. Stat. § 28-105 (Supp. 2015).

above, Phillips was convicted of a Class IIIA felony and up to 18 months' postrelease supervision is permitted.[5]

Both § 28-105 and Neb. Rev. Stat. § 29-2204.02 (Supp. 2015) authorize the imposition of postrelease supervision as part of a determinate sentence. Section 28-105(5) further provides that "[a]ll sentences of post-release supervision shall be served under the jurisdiction of the Office of Probation Administration and shall be subject to conditions imposed pursuant to section 29-2262 and subject to sanctions authorized pursuant to section 29-2266." Thus, as an initial matter, there is no question that it was proper for the district court to impose both a sentence of imprisonment and a sentence of postrelease supervision, and Phillips does not argue otherwise.

Neb. Ct. R. § 6-1904 (rev. 2016) provides the process to undertake when imposing a sentence of postrelease supervision. According to § 6-1904(A),

> [i]n cases requiring a determinate sentence pursuant to Neb. Rev. Stat. § 29-2204.02, the court shall, at the time a sentence is pronounced, impose a term of incarceration and a term of post-release supervision pursuant to Neb. Rev. Stat. § 29-2204.02(1), and shall enter a separate post-release supervision order that includes conditions pursuant to Neb. Rev. Stat. § 29-2262. The court shall specify, on the record, that conditions of the order of post-release supervision may be modified or eliminated pursuant to Neb. Rev. Stat. § 29-2263(3).

In accordance with this subsection, the district court imposed a determinate sentence of 12 months and a 12-month term of postrelease supervision, complete with conditions. It was from this final order that Phillips appealed.

Before addressing the validity of the conditions imposed upon Phillips, we must consider the State's contention that Phillips has waived any objection to those conditions.

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[5] *Id.*

We observe that notice is essential to the resolution of whether Phillips waived any objection to the conditions of his postrelease supervision.[6] Fundamental to the question of notice are whether the defendant was adequately informed about the conditions of his postrelease supervision and whether the defendant was given the opportunity to challenge those conditions. If a defendant is not adequately informed about the conditions imposed or does not receive an opportunity to challenge them, there can be no waiver.

We conclude that, in this case, Phillips was adequately informed of the conditions of his postrelease supervision and was given the opportunity to challenge those conditions. At his sentencing hearing, Phillips refused to sign an attestation to the conditions indicating that he agreed to the conditions of his postrelease supervision. Instead, Phillips agreed only to sign an acknowledgment that he had received those conditions. But our review of the record shows that at no point during that hearing did Phillips specify the issues and concerns he had with the conditions imposed upon him. As such, we conclude that Phillips waived those conditions because his objections were insufficient to preserve them.

## CONCLUSION

The judgment and sentence of the district court are affirmed.

Affirmed.

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[6] Cf. *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Mutual of Omaha Bank, appellee, v. Robert W. Watson, appellant, and Shona Rae Watson, appellee, formerly husband and wife, and Community Bank of Lincoln, Trustee and beneficiary, et al., appellees.

900 N.W.2d 545

Filed August 11, 2017. No. S-16-906.

1. **Actions: Foreclosure: Equity.** An action to foreclose on real estate is an action in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Contracts: Homesteads: Acknowledgments: Conveyances.** A valid acknowledgment of both spouses must appear on the face of an instrument purporting to convey or encumber the homestead of a married person or the instrument is void.
4. **Property: Mortgages: Deeds: Debtors and Creditors.** In considering the use of property as security for a debt, a deed of trust that a buyer gives for the purchase money of real property is generally treated the same as a mortgage that a buyer gives for the same purpose.
5. **Mortgages: Deeds: Security Interests: Sales.** A purchase-money mortgage refers to a security interest that a buyer gives for the unpaid purchase money on a sale of land, as part of the same transaction as the deed, when its funds are actually used to buy the land.
6. **Mortgages: Title: Sales.** A purchase-money mortgage can refer to a mortgage that a buyer gives to the seller or to a third-party lender in order to acquire title to real estate or to make improvements to a property, if the mortgage is given as part of the same transaction in which the title is acquired.
7. **Mortgages: Deeds: Security Interests: Homesteads: Foreclosure.** Because courts normally treat the deed to the mortgagor and the

security interest in the property as being executed simultaneously, a homestead claim will not defeat an action to foreclose a purchase-money mortgage.

8. **Mortgages: Acknowledgments.** A mortgage given by a married person for the purchase money of land, delivered at the same time of the purchase, is not invalid, because it was not executed and acknowledged by the person's spouse.
9. **Homesteads.** The validity of a homestead right rests on a present right of occupancy or possession.
10. **Mortgages: Security Interests: Vendor and Vendee.** When a purchaser must obtain a purchase-money mortgage to acquire real property, the purchaser cannot show a present right of occupancy or possession until after he or she gives the lender the security interest.
11. **Homesteads: Security Interests: Vendor and Vendee.** Restrictions on the encumbrance of a homestead without a spouse's consent or signature do not invalidate a security interest in the property that a purchaser concurrently gives for its purchase price.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Robert W. Watson, pro se.

John D. Stalnaker and Robert J. Becker, of Stalnaker, Becker & Buresh, P.C., for appellee Mutual of Omaha Bank.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

The appellant, Robert W. Watson (Watson), appeals from the district court's summary judgment orders that determined Mutual of Omaha Bank (Mutual) held a valid and enforceable deed of trust against Watson's homestead property. The court determined that the instrument, the primary deed of trust, had first priority as an encumbrance on the property, ordered an execution sale, and foreclosed Watson from asserting any interest in the property.

Both Watson and his then-spouse, Shona Rae Watson, signed the primary deed of trust, but the notary did not certify that Shona had acknowledged the instrument. The notary did certify that Watson and Shona had both acknowledged a secondary deed of trust before the notary on the same day. Watson contends that the court erred in reading these two deeds of trust together to conclude that Watson and Shona intended to encumber their homestead through the primary deed of trust.

In our de novo review of the record, we conclude that even if the court erred in that conclusion, it nonetheless reached the correct result. The undisputed facts show that Watson and Shona could not have acquired title to the property except by giving a security interest for the purchase money through the primary and secondary deeds of trust. Accordingly, the acknowledgment requirement under the homestead statutes did not preclude enforcement of the primary deed of trust and Watson's homestead interest was subject to the seniority of that instrument. We affirm.

## II. BACKGROUND

### 1. Historical Facts

Watson was the manager of Reserve Design, LLC, a company which designed, built, and sold homes in Lancaster County, Nebraska. In April 2008, Watson, as the manager of Reserve Design, executed a deed of trust to secure a loan or line of credit from Cattle National Bank and Trust Company (Cattle National). Under the deed of trust, Reserve Design conveyed a residential property in Lancaster County to Cattle National as trustee and beneficiary if Reserve Design defaulted on its loan obligations. The maximum loan amount was $525,000.

On October 26, 2009, Watson and Shona purchased the same home, which Reserve Design had built but had been unable to sell. Watson and Shona were both members of Reserve Design, but they purchased the home in their personal

capacities. The property became their homestead. On October 26, Watson executed and delivered a promissory note for $417,000 and a second promissory note for $118,414.50 to Community Bank of Lincoln (Community Bank) to fund the purchase price of the residential property and to pay off the prior indebtedness owed to Cattle National by Reserve Design. Upon receiving the payoff, Cattle National released its deed of trust for the property.

Watson and Shona signed the primary deed of trust to secure the $417,000 note and a secondary deed of trust to secure the $118,414.50 note. The instruments conveyed the same property in trust that had been security for the deed of trust in favor of Cattle National. Angela Schwartz, a Community Bank officer, notarized the instruments, but her certification on the primary deed of trust stated that only Watson had acknowledged the instrument before her. That same day, Community Bank assigned the primary deed of trust to TierOne Bank.

Later on October 26, 2009, Watson signed an addendum to a settlement statement in which he verified that $532,140.08 was the payoff to Cattle National. The next day, October 27, Community Bank transferred by wire $532,140.08 to Cattle National.

On November 5, 2009, Community Bank recorded the primary deed of trust and the assignment. A title insurance company issued a title insurance policy, which stated that the insured was TierOne Bank, and its successors or assignees. Subject to exclusions, the policy covered the insured against defects in the deed caused by various circumstances, including "a document affecting Title not [being] properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered."

After TierOne Bank was placed in receivership in June 2010, the receiver sold TierOne Bank's servicing rights to a different bank. In October, the receiver and the other bank assigned all their rights in the primary deed of trust to Mutual.

Watson eventually defaulted on the note, and in January 2013, Mutual brought suit for judicial foreclosure.

On December 16, 2013, Mutual deposed Shona. She and Watson had divorced in 2010, and, at some point, she moved to Missouri. She stated that they had purchased a new home while they were married, but she did not know how the financing was handled. She agreed that her signature appeared to be on the primary deed of trust. But she did not recall any significant facts regarding the execution: i.e., signing the document, being at the closing, which bank she would have been at, or whether a notary was present. She said that Watson would just tell her when to show up and sign papers if he needed her signature and that this happened several times while they were married. She said that she did not know the purpose of the documents. She also did not recall signing the secondary deed of trust for Community Bank but agreed that it looked like her signature.

On December 31, 2013, an unspecified party filed a "Corrective Deed of Trust" that purported to correct Schwartz' certification for the primary deed of trust. The new certification stated that on October 26, 2009, the primary deed of trust had been acknowledged before Schwartz by both Watson and Shona. Schwartz' statement was undated, and neither Watson nor Shona signed the corrective deed.

In a 2015 deposition, Watson testified that he could not recall (1) signing the primary deed of trust, (2) whether he had signed the loan documents at Community Bank, (3) whether Shona was present, or (4) whether the loan officer was present when he signed them. Watson said that he had sometimes signed loan documents at his office or his home. He admitted that the signature on Mutual's copy of the primary deed of trust looked like his.

### 2. Procedural History

Mutual filed its operative amended complaint in January 2014 in which it alleged that Watson had failed to "make

the payments . . . which became due on May 1, 2012, and thereafter" and that Mutual had elected to declare the whole indebtedness due at once. It alleged that it was the holder of a deed of trust that "is, or in equity should be determined to be, a first lien" on the property. Mutual also sought an accounting, a determination that any other interests in the property were junior to its interest, and a judicial foreclosure sale of the property.

Alternatively, Mutual sought a declaratory judgment and equitable subrogation. It alleged that the omission of Shona's acknowledgment in the 2009 primary deed of trust had been corrected by the 2013 corrective deed of trust and that the corrective deed should be equitably subrogated to the first priority position of the primary deed of trust.

Watson filed an answer with affirmative defenses and counterclaims. Generally, he sought a setoff for Mutual's wrongful conduct against any amount that the court found Watson owed to Mutual. First, Watson alleged that Mutual had breached a contractual duty to him under the title insurance policy by commencing a foreclosure action against him. Specifically, he asserted the following: (1) Watson had purchased title insurance to insure the lender against defects in the primary deed of trust, and after the policy was issued, the insurer was liable for any defects; (2) by accepting title insurance, Mutual had agreed that it could not maintain an action against Watson to cure defects in the primary deed of trust; (3) Mutual had a contractual duty under the policy to seek remuneration from the title insurer for defects; and (4) Mutual admitted in a trial brief that it had filed a claim against its title insurer.

Second, Watson alleged that Mutual and the title insurer's agent in Nebraska had colluded to force a judicial sale of his homestead property despite a facial defect in the deed of trust. He alleged that the title insurer had provided legal services to Mutual to protect its own interests in avoiding payment of a claim by Mutual.

Third, Watson sought a judgment declaring that Mutual had contractually indemnified him against any claim for insured conditions and that Mutual's only claim for defects in the deed of trust was against its title insurer. He sought general and special damages.

Mutual moved to dismiss Watson's counterclaims, and the court sustained that motion, finding that Watson was not the insured under the title insurance policy. It rejected Watson's claim that he was a coinsured or an implied insured under the policy because he had paid the premiums and was listed as the title owner of the property. It concluded that Mutual was not seeking damages from Watson for title defects; it was seeking a judicial foreclosure because of Watson's default on the loan. It concluded that the policy covered only Mutual and that Watson was not entitled to any of its benefits.

The court also rejected Watson's argument that the title insurance policy and the primary deed of trust should be construed as one instrument. It concluded that provisions in the deed of trust and title insurance policy, when read together, showed that the parties did not intend for Watson to be a coinsured or covered by the policy. Instead, Watson's payment of the insurance premiums was merely a condition of the loan.

The court also rejected Watson's collusion claim. It reasoned that under the title insurance policy, the insurer had the right to take any action to establish title or to reduce loss or damages to its insured, which actions would not be treated as an admission of liability or waiver of any provision of the policy. The court concluded that these provisions showed Mutual had a right to receive legal assistance from the insurer.

Finally, the court rejected Watson's requests for a declaratory judgment, a setoff, and special damages, because his requests depended on the validity of his contract and collusion counterclaims, which claims the court rejected. It dismissed Watson's counterclaims with prejudice.

Watson then filed a second amended answer in which he reasserted some of his affirmative defenses and a setoff claim.

At some point, Watson moved for summary judgment and Mutual moved for partial summary judgment. But because Watson did not request any motions for the transcript on appeal, the record contains only the court's orders.

(a) First Summary Judgment

In December 2015, the court ruled on Watson's motion for summary judgment and Mutual's motion for partial summary judgment. It found that the proceeds from the primary and secondary notes were used to pay off Reserve Design's indebtedness to Cattle National, for the purpose of paying the purchase price.

The court rejected Watson's argument that the homestead of a married person cannot be encumbered unless the instrument is executed and acknowledged by both the husband and the wife. It agreed with Mutual that the primary deed of trust should be construed together with the secondary deed of trust. It considered the general rule that instruments executed at the same time, by the same parties, for the same purpose, and during the same transaction are treated as one instrument and construed together.[1] The court cited a 1922 case in which a signed purchase contract for the sale of a homestead was enforced against the purchaser despite the lack of the husband's and wife's acknowledgments, because they signed it at the same that they signed and duly acknowledged a warranty deed to convey the property.[2] Relying on this authority, the court concluded that the defective acknowledgment in the primary deed of trust was not fatal.

The court noted that Watson had executed the primary and secondary promissory notes on the same day, Watson and Shona had both signed the primary and secondary deeds of trust, and both of their signatures had been acknowledged on

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[1] See, e.g., *In re Estate of West*, 252 Neb. 166, 560 N.W.2d 810 (1997).

[2] See *Farmers Investment Co. v. O'Brien*, 109 Neb. 19, 189 N.W. 291 (1922).

the secondary deed of trust. It reasoned that Community Bank would not have made either loan without a corresponding deed of trust and that Watson's and Shona's signatures on the deeds of trust showed their joint consent and intent to encumber their homestead. It ruled that the documents should be read together to accurately reflect the parties' intent.

The court concluded that Watson had failed to present evidence creating a genuine issue of fact whether Mutual's lien had first priority. The court further stated that even if Watson had done so, Mutual had a first priority encumbrance on the property under its theory of equitable subrogation. It found that Community Bank had made the loans to pay off Reserve Design's debts, with the intent and understanding that Cattle National's deed of trust would be released and that Community Bank's primary deed of trust would have first priority status. The court overruled Watson's motion for summary judgment, granted Mutual's motion for partial summary judgment, and determined that the primary deed of trust had first priority as an encumbrance on the property.

(b) Second Summary Judgment

In September 2016, the court issued an order in which it ruled on Watson's motion to dismiss and Mutual's motion for summary judgment and a default judgment. According to the court's order, Mutual sought a default judgment against other potential creditors, which motion the court granted.

In overruling Watson's motion to dismiss, the court rejected his argument that Mutual had failed to name all the necessary parties because it had not named the title insurer and its Nebraska agent insurer. The court reasoned that it had dismissed Watson's counterclaims related to the title insurer because Watson was not an insured under the policy, which did not preclude Mutual from seeking a first priority encumbrance for the primary deed of trust.

The court concluded that the only remaining issue was whether Watson and Shona were in default and concluded

that they clearly were. It found that Watson and Shona owed Mutual $533,459.36 in principal, interest, and costs. It ordered an execution sale and foreclosed Watson and Shona from asserting any interest in the property.

## III. ASSIGNMENTS OF ERROR

Watson assigns that the court erred as follows:

(1) in determining that the primary deed of trust was valid and enforceable;

(2) in determining that the primary deed of trust and secondary deed of trust should be read together;

(3) in concluding that it had jurisdiction to hear Mutual's request for a declaratory relief;

(4) in granting Mutual a judicial foreclosure; and

(5) in dismissing Watson's counterclaims.

## IV. STANDARD OF REVIEW

[1,2] An action to foreclose on real estate is an action in equity.[3] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[4]

## V. ANALYSIS

### 1. Enforceability of Primary Deed of Trust Under Homestead Statutes

Watson contends that the primary deed of trust failed to satisfy the requirements of Neb. Rev. Stat. §§ 76-211 and 76-216 (Reissue 2009). Both of these sections are part of Nebraska's statutory scheme dealing with instruments which convey interests in real property. Section 76-211 governs the execution

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[3] See, e.g., *Twin Towers Condo. Assn. v. Bel Fury Invest. Group*, 290 Neb. 329, 860 N.W.2d 147 (2015); *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 352 N.W.2d 921 (1984).

[4] *Poullos v. Pine Crest Homes*, 293 Neb. 115, 876 N.W.2d 356 (2016).

requirements for a deed: "Deeds of real estate, or any interest therein, in this state, except leases for one year or for a less time, if executed in this state, must be signed by the grantor or grantors, being of lawful age, and be acknowledged or proved and recorded . . . ." A deed is defined as "every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and leases for one year or for a less time."[5]

Section 76-216 provides that a grantor must acknowledge a deed "with an acknowledgment as defined in section 64-205." Neb. Rev. Stat. § 64-205 (Reissue 2009) sets out the requirements for a notarial acknowledgment. As relevant here, under § 64-205(4), an authorized officer must know or have sufficient evidence to conclude that the person acknowledging his or her execution of an instrument is the same person who is named in the instrument or the acknowledgment certificate.

However, this court has long held that "'[a] deed to real estate, executed and delivered, is valid between the parties, though not lawfully acknowledged nor witnessed, and is sufficient to convey the land described therein, with the exception of the homestead of the grantor.'"[6]

The homestead exception exists because of the statutory requirements under Neb. Rev. Stat. § 40-104 (Reissue 2008). Section 40-104 sets forth that the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both spouses. The statute does not provide for proving a conveyance or encumbrance without an acknowledgment of the instrument.

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[5] Neb. Rev. Stat. § 76-203 (Reissue 2009).

[6] *Blum v. Poppenhagen*, 142 Neb. 5, 12, 5 N.W.2d 99, 103 (1942), quoting *Wilson v. Wilson*, 85 Neb. 167, 122 N.W. 856 (1909). Accord, *Lindquist v. Ball*, 232 Neb. 546, 441 N.W.2d 590 (1989); *Mazanec v. Lincoln Bonding & Ins. Co.*, 169 Neb. 629, 100 N.W.2d 881 (1960).

In a long line of cases, this court has held that an acknowledgment is essential when conveying a homestead.[7] Similarly, in cases extending back to the 1800's, this court has held that an instrument purporting to convey or encumber the homestead of a married person is void if it is not executed and acknowledged by both the husband and the wife.[8]

[3] Mutual contends that Schwartz' corrective deed of trust was a sufficient certification that she had acknowledged the primary deed of trust 4 years earlier and that Watson presented no evidence to show that he and Shona had not acknowledged the instrument. Mutual cites no authority for this argument, and it is contrary to well-established case law. A valid acknowledgment of both spouses must appear on the face of an instrument purporting to convey or encumber the homestead of a married person or the instrument is void.[9]

Mutual also argues that Schwartz' corrective deed of trust is an enforceable encumbrance standing alone, because this court has recognized the use of a corrective deed to correct defects in a recorded instrument. But the four cases that Mutual cites are not helpful. In three cases, the efficacy of the corrective deed was not at issue; nor did the corrective deed purport to validate a fatal defect that would have rendered the instrument void.[10]

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[7] See, *In re Estate of West, supra* note 1; *Lindquist, supra* note 6; *Storrs v. Bollinger*, 111 Neb. 307, 196 N.W. 512 (1923); *Anderson v. Schertz*, 94 Neb. 390, 143 N.W. 238 (1913); *Solt v. Anderson*, 71 Neb. 826, 99 N.W. 678 (1904).

[8] See, e.g., *Krueger v. Callies*, 190 Neb. 376, 208 N.W.2d 685 (1973); *Martin v. Norris Public Power Dist.*, 175 Neb. 815, 124 N.W.2d 221 (1963); *Trowbridge v. Bisson*, 153 Neb. 389, 44 N.W.2d 810 (1950); *Storrs, supra* note 7; *Wilson, supra* note 6; *Whitlock v. Gosson*, 35 Neb. 829, 53 N.W. 980 (1892).

[9] See, *Krueger, supra* note 8; *Martin, supra* note 8; *Storrs, supra* note 7; *Anderson, supra* note 7; *Whitlock, supra* note 8.

[10] See, *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 816 N.W.2d 728 (2012); *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004); *Gustafson v. Gustafson*, 239 Neb. 448, 476 N.W.2d 819 (1991).

In the fourth case, a grantor had gifted land to her son as a joint tenant with herself, but the deed's legal description of the property was wrong. The mistake was discovered after a feud developed between the mother and son. The son did not ask her to record a corrective deed while she was alive, but instead sought reformation of the deed after her death. In her will, she left her estate to her grandson, which meant that the disputed property would pass to her grandson if the deed were not reformed. We explained that during the grantor's lifetime, a deeded gift cannot be judicially reformed without the grantor's consent. We held that in an action against an heir or devisee after a grantor's death, a court can equitably reform a deed that gifts property only if the evidence shows that the grantor would have consented to the reformation after learning of the alleged mistake.[11] The son's evidence did not.

Mutual cites no case that supports its contention that a party benefiting from a conveyance or encumbrance of real property can unilaterally reform such instrument without presenting evidence to a court that would support a rescission or reformation. Even if such cases exist, they would not negate § 40-104's more specific requirement that both spouses execute *and* acknowledge an instrument that conveys or encumbers the homestead of a married person.

Nonetheless, in cases where a contract of sale, deed of conveyance, or encumbrance of a homestead was found void for failing to comply with execution requirements, the homestead right already existed.[12] And we find merit to Mutual's alternative argument that the acknowledgment requirement does not apply here, because Watson and Shona took title to the property subject to a purchase-money security instrument.

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[11] See *Hohneke v. Ferguson*, 196 Neb. 505, 244 N.W.2d 70 (1976).

[12] See, e.g., *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989); *Christensen v. Arant*, 218 Neb. 625, 358 N.W.2d 200 (1984); *Wilson, supra* note 6; *Whitlock, supra* note 8.

[4,5] In considering the use of property as security for a debt, a deed of trust that a buyer gives for the purchase money of real property is generally treated the same as a mortgage that a buyer gives for the same purpose.[13] A purchase-money mortgage refers to a security interest that a buyer gives for the unpaid purchase money on a sale of land, as part of the same transaction as the deed, when its funds are actually used to buy the land.[14]

[6] A purchase-money mortgage can refer to a mortgage that a buyer gives to the seller or to a third-party lender in order to acquire title to real estate or to make improvements to a property, if the mortgage is given as part of the same transaction in which the title is acquired.[15] If a seller carries the mortgage, the instrument is called a "'vendor purchase money mortgage.'"[16] If a third party carries the mortgage, it is called a "'third party purchase money mortgage.'"[17] A purchase-money mortgage generally takes precedence over all existing and subsequent claims and liens against the mortgagor as to the property sold.[18] Notably, in making that determination, a purchase-money mortgage and deed conveying title to the mortgagor are treated as being executed simultaneously if the instruments were intended to be part of the same transaction.[19]

[7] Because courts normally treat the deed to the mortgagor and the security interest in the property as being executed simultaneously, we long ago held that a homestead claim will not defeat an action to foreclose a purchase-money mortgage.

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[13] Restatement (Third) of Property: Mortgages, Introduction (1997); 54A Am. Jur. 2d *Mortgages* § 1 (2009).

[14] See *Commerce Savings Lincoln v. Robinson*, 213 Neb. 596, 331 N.W.2d 495 (1983).

[15] See Restatement, *supra* note 13, § 7.2.

[16] *Id.*, § 7.2, comment *a*. at 459.

[17] *Id.*

[18] *Commerce Savings Lincoln, supra* note 14.

[19] See Restatement, *supra* note 13, § 7.2, comment *b*.

Mutual correctly argues that in 1897, we addressed this issue in *Prout v. Burke*.[20]

In *Prout*, a married woman purchased a house that became the family homestead. The seller executed the deed to the property before the wife executed promissory notes and a mortgage to secure the notes, as part of the purchase price. Later, the seller's assignee sought a foreclosure, and the wife and husband defended that the mortgage was void because the husband had not executed and acknowledged it. We recognized that under the homestead statutes, a mortgage on the homestead of a married person is invalid unless the instrument is executed and acknowledged by the husband and the wife. We also recognized that the mortgage would be void if the husband and wife's homestead rights had attached to the property when only the wife executed and acknowledged the mortgage. But we treated the deed and the mortgage as though they were simultaneously executed, because they were part of the same transaction. We concluded that the wife acquired title to the property subject to the mortgagee's lien:

> [N]o homestead right existed in the [husband and wife] at the time the mortgage was given, inasmuch as the purchase of the premises and the execution of the mortgage thereon for the unpaid purchase money were parts of the same transaction, so that [the wife] acquired the title to these lots subject to the lien of this mortgage thereon. Of necessity such lien must have priority over the homestead right, since such right could not exist until after the purchase was effected. In other words, that a homestead is not acquired, within the meaning of the statute, until the claimant has obtained title of some kind to the land, or, at least, has so complied with the contract of purchase as to be in a position to demand title. It has been held that mortgage given to secure the unpaid purchase money of land executed simultaneously with the

[20] *Prout v. Burke*, 51 Neb. 24, 70 N.W. 512 (1897).

> deed takes precedence of a judgment against the mortgagor. . . . Upon the same principle a mortgage given by a wife for the purchase money, delivered at the time of the purchase, is not invalid because [it was] not executed and acknowledged by the husband.[21]

[8] Accordingly, we held in *Prout* that a mortgage given by a married person for the purchase money of land, delivered at the same time of the purchase, is not invalid, because it was not executed and acknowledged by the person's spouse.[22]

[9-11] More recently, this court has held that the validity of a homestead right rests on a present right of occupancy or possession.[23] And when a purchaser must obtain a purchase-money mortgage to acquire real property, the purchaser cannot show a present right of occupancy or possession until after he or she gives the lender the security interest. Accordingly, it is the general rule that restrictions on the encumbrance of a homestead without a spouse's consent or signature do not invalidate a security interest in the property that a purchaser concurrently gives for its purchase price.[24]

Contrary to Watson's argument in his reply brief, Community Bank was the holder of a third-party purchase-money security instrument that Watson and Shona executed to purchase the property. Because Watson and Shona could not have acquired title until they executed the deeds of trust, they had no homestead interest until after they executed the primary deed of trust. Thus, the homestead statutes did not apply and Shona's voluntary acknowledgment could be proved by extrinsic

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[21] *Id.* at 27, 70 N.W. at 513 (citing cases from other states). Accord *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994).

[22] *Prout, supra* note 20 (citing authorities).

[23] See, e.g., *Blankenau v. Landess*, 261 Neb. 906, 913, 626 N.W.2d 588, 595 (2001); *Travelers Indemnity Co., supra* note 3; *Mainelli v. Neuhaus*, 157 Neb. 392, 59 N.W.2d 607 (1953).

[24] See, Annot., 45 A.L.R. 395 (1926); 2 Joyce Palomar, Patton and Palomar on Land Titles § 398 (3d ed. 2003).

evidence. Watson does not contend that the extrinsic evidence was insufficient to show that Shona voluntarily acknowledged the instrument, and we conclude that it was sufficient.

Because we reach this conclusion, we need not address Watson's contention that the court lacked jurisdiction to provide declaratory relief because it failed to require Mutual to join the title insurer as a party. That contention is relevant only to the district court's alternative conclusion that Mutual was entitled to a first priority encumbrance on the property under its theory of equitable subrogation. Because we conclude that the primary deed of trust is valid, the court's alternative reasoning for granting relief is a moot issue.

### 2. Watson's Assignment of Error Regarding Court's Rejection of His Counterclaims Is Moot

Watson contends that the court erred in dismissing his counterclaims, because Mutual and its title insurer owed him duties under the policy based on his payment of the premiums. He argues that Mutual was required to seek compensation from its insurer for defects in the primary deed of trust and that the insurer was required to pay its insured for damages resulting from the unenforceability of the instrument. Having determined that the primary deed of trust is enforceable, we need not decide whether or when a title insurer could be liable to a purchaser of real property.

## VI. CONCLUSION

Although our reasoning differs somewhat from the district court, in our de novo review of the record, we conclude that the court did not err in finding that the primary deed of trust was valid and enforceable.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Theodore D. Fraizer, respondent.

899 N.W.2d 912

Filed August 11, 2017. No. S-17-432.

Original action. Judgment of public reprimand.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Per Curiam.

## INTRODUCTION

This case is before the court on the conditional admission filed by Theodore D. Fraizer, respondent, on May 25, 2017. The court accepts respondent's conditional admission and enters an order of public reprimand.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 12, 1979. At all relevant times, he was engaged in the practice of law in Lincoln, Nebraska.

On April 25, 2017, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent. The formal charges consist of one count against respondent arising from his appointment as successor trustee of a trust created from the assets of the estate of Martin Buschkamp. The formal charges state that on May 3, 2006, Martin Buschkamp died. Respondent filed an estate

proceeding in the county court for Lancaster County, Nebraska, on May 12. The Buschkamp estate was closed in May 2009, and the remaining assets were transferred to the Martin Buschkamp Trust ("Buschkamp Trust"). In August 2013, respondent accepted an appointment as successor trustee of the Buschkamp Trust.

At some point, a beneficiary of the Buschkamp Trust filed a grievance against respondent with the Council for Discipline alleging that respondent failed to timely conclude all matters related to the Buschkamp Trust and failed to make a timely distribution of its remaining assets. In his response to the grievance, respondent acknowledged that he had not been diligent in finalizing the Buschkamp Trust matters, and he stated, "'[The beneficiary] is correct that I have let the remaining aspects of the matter linger too long. . . .'" He stated that he would be responsible for any interest or penalties.

Respondent ultimately completed the matters related to the Buschkamp estate and the Buschkamp Trust. All funds were distributed to the beneficiaries.

The formal charges allege that by his actions, respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence) and 3-508.4 (misconduct).

On May 25, 2017, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313(B) of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney and professional conduct rules §§ 3-501.3 and 3-508.4(a). In the conditional admission, respondent knowingly does not challenge or contest the truth of the matters conditionally asserted and waived all proceedings against him in exchange for a public reprimand.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's proposed discipline is appropriate and consistent with

sanctions imposed in other disciplinary cases with similar acts of misconduct.

## ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.3 and 3-508.4 and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

## CONCLUSION

Respondent is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of public reprimand.

Nebraska Supreme Court
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# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Richard H. Hoch, respondent.

899 N.W.2d 913

Filed August 11, 2017. No. S-17-588.

Original action. Judgment of disbarment.

Heavican, C.J., Wright, Miller-Lerman, Cassel, and Stacy, JJ.

Per Curiam.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Richard H. Hoch, on June 5, 2017. The court accepts respondent's voluntary surrender of his license and enters a judgment of disbarment.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on July 2, 1964. On June 5, 2017, respondent filed a voluntary surrender of license to practice law, in which he stated that on August 13, 2016, he received notice from the Counsel for Discipline of an overdraft on his trust account. He admits that he misapplied client funds being held in his trust account and used them to cover office expenses, in violation of Neb. Ct. R. of Prof. Cond. § 3-501.15. Respondent stated that he freely, knowingly, and voluntarily chooses not to contest the truth of the suggested allegations made

against him. He also stated that he freely, knowingly, and voluntarily surrenders his privilege to practice law in the State of Nebraska; waives his right to notice, appearance, or hearing prior to the entry of an order of disbarment; and consents to the entry of an immediate order of disbarment.

## ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the suggested allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the suggested allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of

Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

Kelch and Funke, JJ., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Randall R. Robbins, appellant.

900 N.W.2d 745

Filed August 18, 2017. No. S-16-155.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Motions to Vacate: Motions for New Trial: DNA Testing: Appeal and Error.** Under the DNA Testing Act, an appellate court will not reverse a trial court's order determining a motion to vacate a judgment of conviction or grant a new trial absent an abuse of the trial court's discretion.
3. **DNA Testing: Appeal and Error.** Under the DNA Testing Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous.
4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
5. **Appeal and Error.** Absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court.
6. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
7. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature.
8. ____: ____: ____: ____. In construing a statute, an appellate court's objective is to determine and give effect to the legislative intent of the enactment.
9. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.

10. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant before the order from which he or she is appealing.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Reversed and remanded with directions to dismiss.

Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

## I. INTRODUCTION

In 2003, Randall R. Robbins was sentenced to a period of 40 to 60 years' incarceration for second degree murder for the strangulation death of his girlfriend, Brittany Eurek.

On September 4, 2012, Robbins filed a motion in the district court requesting (1) postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016), (2) a new trial based on newly discovered evidence pursuant to Neb. Rev. Stat. § 29-2101(5) (Reissue 2016), and (3) a new trial based on DNA testing pursuant to § 29-2101(6). The district court denied Robbins' request for postconviction relief as time barred and denied Robbins' request for a new trial under § 29-2101(5), because it was filed more than 3 years after Robbins' conviction. The district court granted Robbins' request for DNA testing. Robbins received pharmacogenetic testing, via a buccal swab, which indicated that he was an "intermediate metabolizer" of prescription drugs.

Based on these results, Robbins asserted that while the dosage of the Zoloft medication he was taking at the time

of the murder was the recommended amount for the average metabolizer, the dosage was too high for his body to properly metabolize. Robbins claims that this resulted in his experiencing a side effect, which caused him to be violent and homicidal.

Robbins therefore argued that he was entitled to relief under the DNA Testing Act (Act), Neb. Rev. Stat. § 29-4116 et seq. (Reissue 2008), because new scientific evidence could contribute to and establish defenses at trial of an inability to formulate intent, intoxication, or insanity. Following an evidentiary hearing, the district court denied Robbins' motion for new trial or new sentencing hearing based on the pharmacogenetic testing results. Robbins appeals. We hold that the district court committed plain error in granting Robbins' motion for DNA testing. We reverse, and remand with directions to dismiss.

## II. BACKGROUND

### 1. Factual Background

#### (a) Zoloft Prescription

On March 26, 2002, Dr. Richard Wurtz, a family practitioner, gave Robbins a standard trial dosage of Zoloft, 50 mg per day (14 pills), for Robbins' anxiety and told Robbins to follow up with him in 2 weeks. The trial dosage included product information. Wurtz testified that he did not give Robbins a prescription for Zoloft and that 50 mg is a standard starting dosage.

There is no evidence that Robbins followed up with Wurtz or that Robbins ever filled a Zoloft prescription written by Wurtz. However, Robbins testified that at the time of the homicide, he was routinely taking one 50-mg tablet of Zoloft each day. The record is not clear as to how Robbins received the Zoloft without a prescription. Robbins testified that he did not take Zoloft the day of the homicide because he did not take Zoloft when he drank alcohol, and he was planning to drink alcohol that day.

(b) Strangulation of Eurek

On June 1, 2002, Robbins, a 17-year-old just shy of his 18th birthday, was watching a movie at his residence with Eurek, with whom he had a 6-month old child. Shortly thereafter, they had sexual intercourse in Robbins' bedroom. During intercourse, Eurek told Robbins that she wanted to have another child. Robbins said he did not want to have another child with her. Eurek became angry with Robbins and said that she did not want to have sex with him. They stopped having sex, and Eurek began accusing Robbins of cheating on her.

Robbins "grabbed her by her throat and told her to stop," and Eurek punched Robbins in the face. Robbins came from behind Eurek, again grabbed her by the throat, and began to strangle her with his hands. Eurek then passed out on the floor. Robbins retrieved a belt from his dresser and put it around Eurek's neck, "pulled it up," and "just sat there." About 5 minutes later, he "pulled [Eurek] over and tied her to the rail that goes downstairs." Eurek "was like turning purple," and Robbins stated he tied her to the stair rail "to make sure that she was dead." Robbins later stated that the belt he used was the belt he had used a couple of weeks earlier to attempt suicide.

Robbins then drove Eurek's vehicle to his mother's residence and told his mother that he killed Eurek. Robbins' mother arrived at Robbins' residence, found Eurek's body, and called the 911 emergency dispatch service.

Robbins admitted to the deputies at the scene that he killed Eurek. Following his arrest, Robbins recounted the events in a statement to an investigator. During Robbins' confession to the investigator, he stated that the marks on his neck were scratches from when Eurek was "reaching back trying to make me stop." Robbins also expressed concern that he did not take Zoloft that day. When asked by the investigator whether taking his Zoloft made him feel bad, he answered:

> I don't feel right I can tell you that much since I've been taking it today I don't feel like I should. Usually I feel like I got . . . I don't know I don't know if it's a

problem or what I always have things on my mind causing things on my mind.

(c) Robbins' Behavior on Zoloft

Following his arrest, Robbins continued to take Zoloft while at the juvenile detention center. There was evidence that while at the juvenile detention center, Robbins' dose was doubled without any ill effects. Also while at the juvenile detention center, a psychiatrist hired by Robbins' trial counsel evaluated Robbins and concluded that Robbins was competent to stand trial and was not insane at the time of the homicide.

In a deposition taken July 21, 2015, Robbins testified that when he started taking Zoloft, he felt like he had to be moving all the time, which "progressed into agitation." Robbins also testified that his agitation and aggression increased about 3 or 4 weeks after starting Zoloft. Robbins indicated that his mother called Wurtz about the changes in his behavior prior to the homicide. Wurtz testified that there was no record of a call from Robbins' mother.

Trial counsel was deposed. In the deposition, counsel testified contrary to Robbins' assertions regarding Zoloft's causing agitation. Trial counsel indicated that Robbins described Zoloft as calming him down and wondered whether not taking Zoloft on the day of the homicide caused Robbins to be more agitated. In a July 2, 2002, transcribed statement to trial counsel, Robbins told him that Zoloft improved his mental state and that he "was never upset and never sad or down" but that when he did not take Zoloft, he was "more emotional" and would "get all upset."

Robbins also alleges two suicidal episodes. One episode occurred a couple of years before Robbins was placed on Zoloft; the other occurred a couple of weeks prior to the homicide while Robbins was taking Zoloft. In addition to the alleged suicide attempts, there were two other episodes of physical aggression by Robbins, which the district court found occurred when he was not taking Zoloft.

### (d) Robbins' Pharmacogenetic Testing Results

Pharmacogenetic testing to determine the ability of a particular person to metabolize a medication was approved by the Food and Drug Administration for commercial use in December 2004. The test was administered to Robbins via a buccal swab, and the swab was sent to an accredited DNA parentage testing group. It is unclear from the record who administered the test. The district court used the terms "genetic testing," "DNA testing," and "pharmacogenetic testing" interchangeably in reference to the test given to Robbins pursuant to its order.

According to Dr. Daniel Hilleman, a pharmacist, there are four main categories of metabolizing Zoloft: extensive metabolizer, intermediate metabolizer, poor metabolizer, and "ultrarapid" metabolizer. According to the testing group's document explaining the categories, for an individual who tests as an intermediate metabolizer, "[t]his means that you have only one of two operating pathways, and will need a lower than normal dosage and need to carefully monitor medication."

Robbins' pharmacogenetic test results showed that he was an intermediate metabolizer. The test results stated that this had a "[m]ajor" clinical impact and that a prescriber should "consider less than standard dosage to prevent adverse effects" in an intermediate metabolizer.

Hilleman testified that Zoloft was one of the drugs affected by the enzyme measured in the test. Hilleman explained that the reduced ability to metabolize in an intermediate metabolizer meant that "the amount of drug in the body would be increased because the amount of drug that's being detoxified would be relatively less than someone that had full metabolic capacity." Hilleman also stated that according to the FDA-approved labeling, the side effects of Zoloft in major depressive disorders that occurred with rates greater than 10 percent included "dry mouth, somnolence, dizziness, diarrhea, nausea, [and] insomnia."

(e) Zoloft Black Box Warning

Hilleman testified that a "black box warning" is "an insert within the formal prescribing information that the Food and Drug Administration mandates be included when a significant risk with a particular drug exists" and that such warnings were not available to treating physicians, psychiatrists, or pharmacologists prior to 2004.

The black box warning for Zoloft states in relevant part: "Antidepressants increased the risk compared to placebo of suicidal thinking and behavior (suicidality) in children, adolescents, and young adults in short-term studies of major depressive disorder (MDD) and other psychiatric disorders. . . . Depression and certain other psychiatric disorders are themselves associated with increases in the risk of suicide."

The black box warning states that suicidal thoughts and behavior were adverse reactions most common in children, adolescents, and young adults. Hilleman stated that he agreed with the black box warning, and he also connected Zoloft with violent behavior, because "there are some additional independent reports in the medical literature that have documented an association between the use of antidepressants and violent behavior." Hilleman also testified that "most of the adverse reaction reports were suicide attempts" but that there were also reports of homicide attempts. Hilleman explained that the inability to metabolize Zoloft could result in such adverse reactions because

> [t]he abnormality in the functioning of the CYP2C19 enzyme could have led to higher amounts of drug in a patient, and then a greater effect in that patient in terms of adverse reactions of which one is suicidal ideation and/or behavior, and according to the report that I cited from [a research journal article] which associates reports of violence towards others, with antidepressants, could have led to an increase in violent tendency towards others.

Walter Duffy, a psychiatrist who evaluated Robbins due to truancy and alcohol and cannabis dependence in early 2002,

was an expert for the State and testified by deposition that pharmacogenetic testing "is a tool. It is not a bull's eye." Duffy testified that in his practice, he more often evaluates the results and side effects experienced by the patient and adjusts the medicine or dosage accordingly, rather than resort to pharmacogenetic testing.

Robbins' trial counsel testified that knowledge of the DNA results "might very well have affected what I did at sentencing or how I negotiated with the county attorney, what information I provided to the county attorney." The district court found that "neither Dr. Hilleman nor Dr. Duffy made a causal connection between [Robbins'] being an intermediate metabolizer of Zoloft and suicidal or homicidal side effects." In addition, the court found that neither doctor observed any side effects experienced by Robbins or made a causal link between consumption of Zoloft and the homicide committed by Robbins.

The district court further found that according to Hilleman, "[o]ne of the effects of higher amounts of the drug reaching the brain is a greater potential for adverse side effects such as suicidal ideation . . . ." However, the court found that "no studies were identified by the experts that differentiated between the four categories of metabolizers regarding whether one category is more likely to have suicidal ideation or homicidal thoughts compared to the others."

### 2. Procedural Background

Robbins was initially charged with first degree murder. He subsequently entered a plea of guilty to a reduced charge of second degree murder. On April 24, 2003, Robbins was sentenced to a period of 40 to 60 years' incarceration. Robbins appealed from his conviction and sentencing. The Nebraska Court of Appeals affirmed Robbins' conviction and sentence.[1]

On May 20, 2011, Robbins, acting pro se, filed a motion to compel the Nebraska Department of Correctional Services to

[1] See *State v. Robbins*, 12 Neb. App. xxxix (No. A-03-500, Sept. 15, 2003).

allow him to take a DNA drug reaction profile test. On May 23, the district court overruled Robbins' motion to compel because there was no pending postconviction proceeding.

On September 4, 2012, Robbins, still acting pro se, filed a motion in the district court requesting (1) postconviction relief pursuant to § 29-3001 et seq., (2) a new trial based on newly discovered evidence pursuant to § 29-2101(5), and (3) a new trial based on DNA testing pursuant to § 29-2101(6).

On September 24, 2012, the State filed a motion to dismiss Robbins' motion for postconviction relief. On November 21, following a hearing, the court filed an order (1) denying Robbins' request for postconviction relief as time barred, (2) denying Robbins' request for a new trial under § 29-2101(5), and (3) granting Robbins' request for DNA testing under § 29-4120(5).

The court found that Robbins' allegation met the standard set forth in § 29-4120(5), that DNA testing may be relevant to the claim that a person was wrongfully convicted or sentenced. Pursuant to § 29-4122, the court appointed counsel to represent Robbins' claim under the Act. On January 14, 2013, Robbins' court-appointed attorney was allowed to withdraw and the Nebraska Commission on Public Advocacy was appointed. Robbins apparently separately appealed from the denial of postconviction relief, and the Court of Appeals affirmed the district court's judgment, finding that Robbins' motion was untimely filed.[2]

On January 28, 2016, following a hearing, the district court overruled and dismissed Robbins' motion for DNA testing. The court held that (1) the DNA evidence did not show a complete lack of evidence to establish any element of the crime charged, so Robbins was not entitled to a finding of complete exoneration; (2) the absence of DNA evidence did not affect a substantial right of Robbins, nor would it probably have produced a substantially different result, thus Robbins

[2] See *State v. Robbins*, 21 Neb. App. xxv (No. A-12-1158, Sept. 10, 2013), and *State v. Robbins*, 20 Neb. App. lxii (No. A-13-261, May 15, 2013).

was not entitled to a new trial based on this evidence; and (3) it was not unfair to Robbins that he was sentenced without the court's knowing of his less-than-average metabolization of Zoloft, thus the DNA evidence was not exculpatory, nor did it have any relevance to a claim that Robbins was wrongfully sentenced or convicted.

Shortly after oral arguments, we directed the parties to submit supplemental briefs addressing (1) whether the DNA test utilized by Robbins met the requirements set forth in § 29-4120(1)(b), (2) whether the Act allows testing of this type, and (3) whether the evidence regarding Robbins' status as an intermediate metabolizer is "exculpatory evidence" under §§ 29-4119, 29-4120, and 29-4123.

## III. ASSIGNMENTS OF ERROR

Robbins assigns, restated, that the district court erred in (1) denying a new sentencing and (2) overruling his motion for new trial.

## IV. STANDARD OF REVIEW

[1-3] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[3] Under the Act, an appellate court will not reverse a trial court's order determining a motion to vacate a judgment of conviction or grant a new trial absent an abuse of the trial court's discretion.[4] Under the Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous.[5]

[4] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[6]

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[3] *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007).

[4] *State v. Parmar*, 283 Neb. 247, 808 N.W.2d 623 (2012).

[5] *Id.*

[6] *State v. Thompson*, 294 Neb. 197, 881 N.W.2d 609 (2016).

[5,6] Absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court.[7] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[8]

## V. ANALYSIS

Before addressing Robbins' argument that he was entitled to relief under the Act, we must determine whether the Act is applicable and allows the testing sought in this case. Finding that it does not, we must reverse, and remand with directions to dismiss.

In his supplemental brief, Robbins contended that the Act applies to testing of this type because (1) he was in custody at the time the sample for DNA testing was taken from his cheek and has remained in custody since that time, (2) his DNA profile is not subject to change, and (3) the Act does not expressly limit how evidence may be used and, in the alternative, if it may only be used for purposes of determining identity, "[a] person suffering from an involuntary and adverse reaction to medication is a different person."[9]

### 1. Interpretation of Act

[7] We first turn to whether the DNA testing sought by Robbins is the type of DNA testing intended under the Act. In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature.[10]

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[7] *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

[8] *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995).

[9] Supplemental brief for appellant at 10.

[10] *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

Section 29-4120(1)(b) provides guidance. Under § 29-4120(1)(b), a person in custody may request DNA testing of biological material only if the biological material "[i]s in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition[.]"

Section 29-4120(5) provides further explanation as to the circumstances under which a court may order DNA testing. That section states that the defendant has the burden of providing the district court with affidavits or evidence at a hearing establishing the three required factual determinations for the district court.[11] Subsection (5) also includes a requirement that "the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition."

In *State v. Pratt*,[12] we explained the "integrity" language in § 29-4120(1)(b) and (5), and we stated:

> The integrity at issue under § 29-4120(5) is that of the "original physical composition" of "the biological material." Since this is a DNA testing statute, the relevant "biological material[s]" are, fundamentally, the DNA. The question under the physical integrity prong thus is whether the evidence has been retained in a manner "likely" to avoid impairment of the original physical integrity of any DNA deposited during the crime or otherwise relevant to the crime.

We further explained:

> No other state or federal DNA statute utilizes this "integrity" language. Most statutes do, however, require a finding that the evidence was subjected to a "chain of custody" sufficient to establish that it has not been "substituted, tampered with, replaced or altered in any

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[11] See *State v. Young*, 287 Neb. 749, 844 N.W.2d 304 (2014).

[12] *State v. Pratt*, 287 Neb. 455, 469, 842 N.W.2d 800, 810 (2014).

> material aspect." Some statutes and cases describe this absence of substituting, tampering, replacing, or altering, as the overall "integrity" of the evidence. We find that to be an apt characterization of the meaning of "integrity" in the context of DNA evidence.[13]

In addition, § 29-4120(4) states that after a motion seeking forensic DNA testing has been filed, the State is required to file "an inventory of all evidence that was secured by the State or a political subdivision in connection with the case." This further implies the nature of the material to be subjected to DNA testing under the Act must be something which can be "inventor[ied]" and "secured by the state or a political subdivision."[14]

[8] To further explain the "integrity" requirement of the Act, we look to its legislative history. In construing a statute, an appellate court's objective is to determine and give effect to the legislative intent of the enactment.[15] According to the legislative history of the Act, the Legislature intended for a defendant to

> be required to present a claim that establishes . . . that the identity of the defendant was a material issue at the trial and that resulted in his or her conviction; that *the evidence to be tested must be in a chain of custody* sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect; and that the results of such testing would be *material to the issue of identity*.[16]

Here, the DNA was acquired from a buccal swab of Robbins' cheek 11 years after the crime to determine how he metabolized pharmaceutical medicines. Unlike the language

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[13] *Id.* at 469-70, 842 N.W.2d at 810-811.

[14] § 29-4120(4).

[15] *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

[16] Judiciary Committee Hearing, L.B. 659, 97th Leg., 1st Sess. 57 (Feb. 23, 2001) (remarks of Senator Kermit Brashear) (emphasis supplied).

suggested in *Pratt* and set forth in the legislative hearings, a defendant's ability to metabolize pharmaceutical drugs does not have an "original physical composition" that can be in a "chain of custody" or "in the actual or constructive possession or control of the state . . . likely to safeguard [its] integrity."[17] A logical reading of the Act does not allow for a court to grant DNA testing in the form of a buccal swab to determine a defendant's metabolism of pharmaceutical medicines.

### 2. Robbins' DNA Evidence as Exculpatory Evidence

Next, we turn to whether the evidence regarding Robbins' status as an intermediate metabolizer of pharmaceutical drugs is "exculpatory evidence" under §§ 29-4119, 29-4120, and 29-4123. We have held that "the only statutory inquiry upon a motion to vacate or for new trial under the Act is whether the DNA evidence 'exonerate[s]' or 'exculpate[s]' the inmate."[18]

Robbins argues that a person's genetic capacity to metabolize prescription drugs is exculpatory evidence under the Act, because it is favorable to Robbins and "material to the issue of guilt . . . or relevant to a claim that [Robbins] was wrongfully sentenced," as he claims was established by Hilleman's testimony.[19]

Section 29-4123 states that after the receipt of the results of the DNA testing, a party may request a hearing before the court "when such results exonerate or exculpate the person." Section 29-4119 defines exculpatory evidence as "evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody."

In *State v. Winslow*,[20] this court reversed the district court's denial of the defendant's request for DNA testing and found that DNA testing of the samples of biological material found

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[17] See § 29-4120(1)(b).

[18] *State v. Pratt, supra* note 12, 287 Neb. at 472, 842 N.W.2d at 812.

[19] Supplemental brief for appellant at 12.

[20] *State v. Winslow, supra* note 3.

at the scene of the crime produced noncumulative, exculpatory evidence. In *Winslow*, the defendant was allegedly part of a group of individuals that broke into the victim's house and raped and murdered her during the course of a failed burglary. This court found that DNA testing would "exclude . . . contributors to the semen sample" and "raise doubts regarding the veracity of the testimony" at the codefendant's trial that "served as the factual basis for [the defendant's] plea and would therefore be favorable" to the defendant.[21] This court reasoned that

> even if [the defendant] were placed at the scene of the crime, such evidence excluding [the defendant] as a contributor would also be relevant to a claim by [the defendant] that he was less culpable than the sentencing court had believed him to be and that therefore, he was wrongfully sentenced.[22]

The Act states that the Legislature finds that DNA testing is "the most reliable forensic technique for *identifying persons* when biological material is found at a crime scene or transferred from the victim to the person responsible and transported from the crime scene."[23] Section 29-4117 states that it is "the intent of the Legislature that wrongfully convicted persons have an opportunity to establish their innocence." Furthermore, in the legislative history of the Act, as stated above, the Legislature explained that its purpose in passing the Act was to allow defendants the opportunity to receive DNA testing that "would be *material to the issue of identity*."[24]

Robbins concedes that "[t]he purpose of genetic testing in this case is not to establish that the results of such testing exonerates or exculpates [him]."[25] Instead, Robbins argues

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[21] *Id.* at 436, 740 N.W.2d at 801.

[22] *Id.* at 437, 740 N.W.2d at 801.

[23] § 29-4118(1) (emphasis supplied).

[24] Judiciary Committee Hearing, *supra* note 16 at 57 (emphasis supplied).

[25] Brief for appellant at 4-5.

that "[t]he issue is one of culpability viewed through the lense [sic] of sentencing mitigation and/or whether new scientific evidence would contribute to and establish defenses at trial of (a) an inability to formulate intent, (b) intoxication, or (c) insanity."[26]

This case is distinguishable from *Winslow*. Unlike *Winslow*, the DNA testing that Robbins sought does not exclude him from being a contributor to DNA found during the investigation into the underlying homicide. Rather, Robbins admits that he killed Eurek and he does not contend that the DNA testing will exculpate or exonerate him as to his identity as the only contributor in her death. Because the evidence from the DNA testing cannot exclude Robbins as a contributor, the holding in *Winslow* does not control under the current facts.

We find no merit in Robbins' argument that this case involves an issue of identity because he was a "different person" while on Zoloft.[27] There is no issue of identity in this case, and as we established above, the DNA testing was not material to the issue of the guilt of the person in custody or that he was less culpable than the sentencing court had believed him to be and that therefore, he was wrongfully sentenced. Because the Act is intended to assist in proving the innocence of a convicted person through establishing the person's *identity*, it cannot be said that evidence from the DNA testing probably would have produced a substantially different result at trial. As such, the evidence is not exculpatory under the Act.

As this is a question of statutory interpretation, we hold that the Act does not apply to DNA testing of the defendant's person for the purpose of determining the defendant's metabolism of prescription medication. Furthermore, new evidence concerning a defendant's metabolism of prescription drugs, when such evidence has no bearing on identity, is not exculpatory under the Act.

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[26] *Id.* at 5.

[27] Supplemental brief for appellant at 10.

[9,10] Absent plain error, assignments of error not discussed in the briefs will not be addressed by this court.[28] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[29] Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.[30] A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant before the order from which he or she is appealing.[31]

We find that it was "plainly evident from the record" that the DNA testing Robbins sought in his motion for DNA testing was not within the purview of the Act. We further find that to apply the Act to a defendant's metabolism of prescription drugs would extend the Act beyond its purpose set forth by the Legislature and, as such, "damage . . . the integrity, reputation, and fairness of the judicial process."[32] We hold that the district court committed plain error in granting Robbins' motion for DNA testing.

## VI. CONCLUSION

The district court committed plain error in granting Robbins' motion for DNA testing. We reverse, and remand with directions to dismiss.

Reversed and remanded with directions to dismiss.

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[28] *State v. Soukharith, supra* note 7.

[29] *In re Estate of Morse, supra* note 8.

[30] *Id.*

[31] *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010).

[32] *In re Estate of Morse, supra* note 8, 248 Neb. at 897, 540 N.W.2d at 132.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Abel Mendez-Osorio, appellant.

900 N.W.2d 776

Filed August 18, 2017. No. S-16-550.

1. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
2. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.

6. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
7. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In the case of an argument presented for the purpose of avoiding procedural bar to a future postconviction proceeding, appellate counsel must present a claim with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.
8. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim based on counsel's ineffective assistance, the defendant must show, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that counsel's performance was deficient. In other words, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A court may address deficient performance and prejudice in either order.
9. **Rules of Evidence: Hearsay.** Excited utterances are an exception to the hearsay rule, because the spontaneity of excited utterances reduces the risk of inaccuracies inasmuch as the statements are not the result of a declarant's conscious effort to make them.
10. **Criminal Law: Statutes: Minors: Words and Phrases.** Under Neb. Rev. Stat. § 28-707(1)(a) (Reissue 2016), "endangers" means to expose a minor child's life or health to danger or the peril of probable harm or loss. Where a child is endangered, it may be injured; it is the likelihood of injury against which § 28-707(1)(a) speaks.
11. **Criminal Law: Statutes.** Courts strictly construe criminal statutes.
12. **Criminal Law: Minors.** Criminal endangerment in Neb. Rev. Stat. § 28-707(1)(a) (Reissue 2016) encompasses not only conduct directed at the child but also conduct which presents the likelihood of injury due to the child's having been placed in a situation caused by the defendant's conduct.
13. **Sentences: Appeal and Error.** An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Inbody and Pirtle, Judges, on appeal thereto from the District Court for Saline County, Vicky L. Johnson, Judge. Judgment of Court of Appeals affirmed in part, and in part vacated and remanded for resentencing.

Brett McArthur for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and, on brief, George R. Love for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller-Lerman, J.

## I. NATURE OF CASE

Abel Mendez-Osorio was convicted and sentenced in the district court for Saline County for terroristic threats, use of a weapon to commit a felony, and negligent child abuse. Mendez-Osorio appealed to the Nebraska Court of Appeals and claimed ineffective assistance of trial counsel in various respects, including failing to adequately prepare for trial and failing to assert various objections to trial evidence. Mendez-Osorio claimed, in particular, that the evidence was insufficient to support a finding that he was guilty of negligent child abuse. The Court of Appeals rejected his claims and affirmed his convictions and sentences. We granted Mendez-Osorio's petition for further review. Upon further review, we affirm the decision of the Court of Appeals, which rejected Mendez-Osorio's claims of ineffective trial counsel and determined that the evidence supported Mendez-Osorio's convictions. However, because we find plain error in sentencing, we vacate all sentences and remand the cause for resentencing.

## II. STATEMENT OF FACTS

On October 26, 2015, Mendez-Osorio was charged by information with count I, terroristic threats under Neb. Rev. Stat.

§ 28-311.01(1) (Reissue 2016); count II, use of a weapon to commit a felony under Neb. Rev. Stat. § 28-1205(1) (Reissue 2016); and count III, misdemeanor negligent child abuse under Neb. Rev. Stat. § 28-707(1) and (3) (Reissue 2016). For completeness, we note that both the caption of the information and the body of count II refer to "use of a weapon to commit a felony" and cite to § 28-1205(1), which is the use crime and was a Class II felony at the time of the incident. Compare § 28-1205(2) (providing for "possession" of weapon during commission of felony, Class III felony). Although there is surplusage in the body of count II referring to the "possession" crime, the case was tried and charged as a "use" crime and the verdict returned by the jury provided for "GUILTY of using a machete or any other weapon . . . **Use of a Weapon to Commit a Felony**." Thus, the incidental reference to "possession" in the information is of no legal consequence.

The charges arose from a domestic incident on September 4, 2015, with Katia Santos-Velasquez, with whom Mendez-Osorio lived in a two-bedroom mobile home. The couple never married but had three children together who were between the ages of 3 and 6. Mendez-Osorio's case was tried to a jury.

Santos-Velasquez testified at trial that she and Mendez-Osorio had argued earlier in the day and that they later argued again about who would leave to buy a pizza for the children's supper. Mendez-Osorio left but did not return until around 11:20 p.m. At that time, the two youngest children were in the larger bedroom, and the oldest child was asleep on the couch. Santos-Velasquez heard Mendez-Osorio enter the home and proceed to the smaller bedroom. Santos-Velasquez testified that Mendez-Osorio was upset and that "every time that he got upset, I would just stay quiet, keep quiet."

Santos-Velasquez testified that from the bedroom door, she observed Mendez-Osorio sharpening his machete. Santos-Velasquez testified that Mendez-Osorio said to her, "this machete, I want it for you" and that he came toward her and told her he was going to kill her. She testified that she

felt threatened and afraid. Without pausing to put on shoes, Santos-Velasquez picked up her two youngest children from the home's larger bedroom and fled the home to seek help. Her third child was asleep on a couch in the living room, and she did not have time to bring him. Santos-Velasquez testified that she was concerned for the safety and well-being of her children, "[b]ecause if he was thinking of doing something to me, he was going to do it to the children too." She was especially concerned for the child she left behind.

Santos-Velasquez testified that after fleeing the mobile home, she ran barefoot to the home of a neighbor and friend, Maria Amador, where she asked for help. Shortly thereafter, Officer Jon Pucket with the Crete Police Department responded and interviewed her at the Amador home. Santos-Velasquez testified that Officer Pucket recommended she obtain a protection order, but she declined because she was afraid of Mendez-Osorio.

Officer Pucket testified that he arrived at the mobile home court within a couple of minutes of 11:20 p.m. There, he observed Santos-Velasquez shoeless, crying, and physically shaking. He testified that her voice was shaking and that she looked "terrified." She stated that she had run out the door of her mobile home with two of her children. Officer Pucket testified that he saw the two children crying. Santos-Velasquez told Officer Pucket that Mendez-Osorio had been sharpening the machete and that he said he was going to kill her and nobody would notice.

Officer Pucket then interviewed Mendez-Osorio, who had remained in the mobile home. Mendez-Osorio stated that nothing happened that night. Officer Pucket asked to see the machete, and Mendez-Osorio led him to a closet where it was sheathed. Mendez-Osorio stated that he had had the machete for only 3 days and that a friend from Wilber, Nebraska, brought him the machete to sharpen.

Amador testified that she and her children were sleeping when she awoke to Santos-Velasquez' knocking on the door

very hard. Santos-Velasquez was crying and afraid and had stated that her husband had a machete and wanted to kill her. Amador testified that one of Santos-Velasquez' children was afraid, so she invited the children to enter her home, and they did. Santos-Velasquez stated that her oldest child was still in the mobile home with Mendez-Osorio and expressed a fear that Mendez-Osorio would "do something to him."

Zoraida Ramos, a city employee who translated between Mendez-Osorio and Officer Pucket, also testified at trial. Ramos observed Santos-Velasquez return to her home after Mendez-Osorio had been taken away by the police. Santos-Velasquez appeared to be nervous and shaking. She was barefoot, her hair was "a mess," and her clothes were in disarray. Santos-Velasquez told Ramos that she and Mendez-Osorio had argued, that he came at her with a machete and put it to her throat, but that she got away and fled the mobile home with two of her children.

Ramos also testified that she observed Santos-Velasquez and Mendez-Osorio's mobile home and that it was "a mess," with minimal furniture in bad shape, and without a working kitchen faucet. Ramos testified that Santos-Velasquez stated that in order to wash dishes, she filled a container in the bathroom with water and then boiled the water.

Arnaldo Leyva testified on behalf of Mendez-Osorio. He testified that he was a coworker of Mendez-Osorio and that he had asked Mendez-Osorio to loan his machete so that Leyva could cut grass. Mendez-Osorio agreed. Leyva lived in Wilber at the time and intended to pick up the machete on September 5, 2015.

The jury found Mendez-Osorio guilty on all counts. On May 9, 2016, the district court sentenced Mendez-Osorio to imprisonment with the Nebraska Department of Correctional Services for 3 years for terroristic threats, for 4 years for use of a weapon to commit a felony, and for 1 year for negligent child abuse. The court stated that "[s]uch sentences shall run concurrent to each other . . . ." The court further sentenced

Mendez-Osorio to "eighteen (18) months of post-release supervision on Count 1 [terroristic threats] and twenty-four (24) months of post-release supervision on Count 2 [use of a weapon], concurrent to each other."

Mendez-Osorio appealed his convictions and sentences to the Court of Appeals. He claimed on appeal that there was not sufficient evidence to support his conviction for negligent child abuse. He also asserted several claims of ineffective assistance of trial counsel, which he argued as two general claims: (1) that counsel failed to adequately prepare for trial and (2) that counsel failed to object to questions that were leading and that called for hearsay.

In a memorandum opinion filed on January 26, 2017, the Court of Appeals rejected Mendez-Osorio's claims. With regard to Mendez-Osorio's claims of ineffective assistance of counsel, the Court of Appeals rejected certain specific claims and determined that the record on direct appeal was not sufficient to consider his remaining claims. The Court of Appeals first rejected Mendez-Osorio's claim that counsel was ineffective for failing to interview potential witnesses. The Court of Appeals rejected this claim because Mendez-Osorio failed to identify any specific witnesses or explain how their testimony could have helped his defense. The Court of Appeals also rejected Mendez-Osorio's claim that counsel was ineffective for failing to object to the State's questioning of Officer Pucket and Amador regarding statements that Santos-Velasquez had made to each of them on the night of the incident. The Court of Appeals reasoned that even if counsel had objected to these statements based on hearsay, the statements would have been admissible as excited utterances, because the evidence showed that the victim made the statements to Officer Pucket and Amador shortly after the incident and that she was still distraught at the time she made the statements. Finally, the Court of Appeals determined that the record on direct appeal was not sufficient to consider Mendez-Osorio's remaining claims of ineffective assistance of counsel. The

Court of Appeals generally reasoned that the claims required "an evaluation of counsel's trial strategy, for which the record is insufficient."

With regard to sufficiency of the evidence for the conviction for misdemeanor negligent child abuse, Mendez-Osorio argued that there was no evidence that he directly threatened or harmed the children and no evidence regarding any effect his actions against Santos-Velasquez had on the children. The Court of Appeals noted that Mendez-Osorio was charged with child abuse pursuant to § 28-707, which provides that one commits child abuse if he or she negligently causes or permits a minor child to be, inter alia, "[p]laced in a situation that endangers his or her life or physical or mental health," § 28-707(1)(a), or "[d]eprived of necessary food, clothing, shelter, or care," § 28-707(1)(c). The Court of Appeals noted testimony that Officer Pucket observed the two children who had been taken from the mobile home crying, and it determined that it could be inferred from such evidence that the children were crying because their mother was fearful of their father, which could have an effect on their mental health. The Court of Appeals further noted evidence that the mobile home was in poor condition and that there was nothing in the home to feed the children, and it determined that this evidence could support a finding that the children had been deprived of necessary food, shelter, or care. The Court of Appeals concluded that there was sufficient evidence to support a conviction for negligent child abuse.

The Court of Appeals affirmed Mendez-Osorio's convictions and sentences. We granted Mendez-Osorio's petition for further review.

## III. ASSIGNMENTS OF ERROR

On further review, Mendez-Osorio repeats, summarized and restated, the arguments he made before the Court of Appeals regarding effectiveness of trial counsel and sufficiency of evidence regarding his conviction for negligent child abuse. He

claims that the Court of Appeals erred when it rejected his ineffective assistance of counsel claim and affirmed his conviction for negligent child abuse.

## IV. STANDARDS OF REVIEW

[1,2] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance. *Id*.

[3] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

[4] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

## V. ANALYSIS

As explained below, we affirm the decision of the Court of Appeals which rejected Mendez-Osorio's claims of ineffective assistance of counsel and affirmed his conviction for

negligent child abuse. In addition, we find plain error in two respects: (1) in imposing a period of postrelease supervision where one of the convictions, use of a deadly weapon to commit a felony, is a Class II felony, see Neb. Rev. Stat. § 28-105(6) (Supp. 2015), and (2) in sentencing Mendez-Osorio to concurrent sentences where a sentence for felony use of a weapon has been imposed, see § 28-1205(3). Accordingly, we affirm the decision of the Court of Appeals affirming Mendez-Osorio's convictions, and we vacate his sentences and remand the cause for resentencing.

### 1. Ineffective Assistance of Counsel

With regard to Mendez-Osorio's claims of ineffective assistance of counsel, the Court of Appeals rejected certain specific claims and determined that the record on direct appeal was not sufficient to consider his remaining claims.

[5,6] Mendez-Osorio is represented on direct appeal by different counsel than the counsel who represented him at trial. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. *State v. Loding, supra*. Otherwise, the issue will be procedurally barred. *Id*. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id*. The determining factor is whether the record is sufficient to adequately review the question. *Id*.

[7] We clarified in *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014), that allegations of how the defendant was prejudiced by trial counsel's allegedly deficient conduct are unnecessary to the specific determination of whether a claim of ineffective assistance of counsel can be determined based on the record on direct appeal. See, also, *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014). In the case of an argument presented for the purpose of avoiding procedural bar to

a future postconviction proceeding, appellate counsel must present a claim with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court. *Id.*

[8] To prevail on a claim based on counsel's ineffective assistance, the defendant must show, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that counsel's performance was deficient. In other words, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. See *State v. Loding*, 296 Neb. 670, 895 N.W.2d 669 (2017). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id*. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*. A court may address deficient performance and prejudice in either order. *Id*.

(a) Preparation for Trial

The Court of Appeals first rejected Mendez-Osorio's claim that counsel was ineffective for failing to interview potential witnesses. The Court of Appeals noted that Mendez-Osorio failed to identify any specific witnesses or make a claim as to how their testimony could have helped his defense. Thus, the Court of Appeals was effectively unable to determine whether this claim could be decided upon the trial record. The Court of Appeals rejected this claim, and we find no error in its decision.

Our review of the record shows that trial counsel for Mendez-Osorio called a witness about the machete, but the witness' testimony contradicted Mendez-Osorio's statements to Officer Pucket to the effect that he did not own the machete.

Mendez-Osorio contends that trial counsel may not have spoken with the witness or perhaps other witnesses. The record is incomplete on the matter, and the Court of Appeals did not err when it rejected this claim on direct appeal.

(b) Objections at Trial

[9] The Court of Appeals also rejected Mendez-Osorio's claim that counsel was ineffective for failing to object to the State's questioning of Officer Pucket and Amador regarding statements Santos-Velasquez made to each of them on the night of the incident. The Court of Appeals reasoned that even if counsel had objected to these statements based on hearsay, the statements would have been admissible as excited utterances, because the evidence showed that the victim made the statements to Officer Pucket and Amador shortly after the incident and that she was still distraught at the time she made the statements. See Neb. Rev. Stat. § 27-803(1) (Reissue 2016) (providing that statement relating to startling event made while declarant was under stress of excitement caused by event is not excluded by hearsay rule). We have observed that excited utterances are an exception to the hearsay rule, because the spontaneity of excited utterances reduces the risk of inaccuracies inasmuch as the statements are not the result of a declarant's conscious effort to make them. *State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016).

We further note that both Officer Pucket and Amador testified live at trial; thus, Mendez-Osorio had the ability to cross-examine them and avoid prejudice due to their testimony. The Court of Appeals did not err when it rejected this claim.

(c) Other Claims

The Court of Appeals rejected the remainder of Mendez-Osorio's claims of ineffective counsel, not repeated here, and generally concluded that the record on direct appeal was not sufficient to consider the remaining claims. The Court of Appeals stated that the claims required "an evaluation of

counsel's trial strategy, for which the record is insufficient." We have examined the record and Mendez-Osorio's remaining claims, and we determine that the Court of Appeals did not err when it concluded that the remaining claims cannot be resolved on direct appeal.

### 2. Sufficiency of the Evidence for Misdemeanor Negligent Child Abuse

A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be placed in a situation that endangers his or her life or physical or mental health, or to be deprived of necessary food, clothing, shelter, or care. § 28-707(1)(a) and (c). According to the jury verdict, Mendez-Osorio was found guilty of "negligently causing or permitting minor children to be placed in a situation that endangered their lives or physical or mental health on or about the 4th day of September, 2015." See § 28-707(1)(a). We sometimes refer to this crime as "endangerment." Section 28-707(3) provides that child abuse is a Class I misdemeanor "if the offense is committed negligently and does not result in serious bodily injury . . . or death." Based on the jury's verdict that Mendez-Osorio's conduct was negligent in nature and given the terms of § 28-707(3), Mendez-Osorio was convicted and sentenced for misdemeanor negligent child abuse.

#### (a) Deprivation of Necessary Food, Clothing, Shelter, or Care

The Court of Appeals concluded that sufficient evidence existed to show that the condition of the mobile home supported a finding of child abuse, because the children were placed in a situation that was not meeting their basic needs of necessary food, shelter, and care under § 28-707(1)(c). However, as noted above, the jury made no such finding in this case. Because the jury reached a verdict based only and specifically on § 28-707(1)(a), pertaining to a situation that

endangers the life or physical or mental health of the children, the Court of Appeals erred when it considered whether there was sufficient evidence under § 28-707(1)(c). It was improper for the Court of Appeals to find support for the verdict on the basis of a theory not submitted to the jury. But, as we explain below, such error does not determine the outcome on further review.

(b) Endangerment

The Court of Appeals also determined that sufficient evidence of endangerment supported Mendez-Osorio's conviction for negligent child abuse under § 28-707(1)(a), and we agree. The record shows Santos-Velasquez testified that after Mendez-Osorio threatened her with the machete, she was afraid for her safety and for the safety and well-being of her children. Witnesses testified as to their observations of Santos-Velasquez and the children. The record shows Mendez-Osorio was aware that children were present in the mobile home when he threatened Santos-Velasquez with the machete. Officer Pucket testified that he observed the younger children crying, and Amador also testified that after Santos-Velasquez fled with the children to Amador's home, at least one of the children was afraid. The oldest child remained in the mobile home alone with Mendez-Osorio after Santos-Velasquez fled with his siblings. The Court of Appeals noted, inter alia, that the mental health of the children could be affected by their mother's fear of their father.

[10,11] Section 28-707(1) provides, in relevant part, "A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be: (a) [p]laced in a situation that endangers his or her life or physical or mental health." We have previously considered § 28-707(1)(a) and stated that under that section, "'endangers' means to expose a minor child's life or health to danger or the peril of probable harm or loss." *State v. Crowdell*, 234 Neb. 469, 474, 451 N.W.2d 695, 699 (1990). We have further stated

that the purpose of criminalizing conduct under the statute is that where "'a child is endangered, it may be injured; it is the likelihood of injury against which the statute speaks.'" *Id*. at 475, 451 N.W.2d at 699 (quoting *State v. Fisher*, 230 Kan. 192, 631 P.2d 239 (1981)). Although courts strictly construe criminal statutes, see *State v. Duncan*, 294 Neb. 162, 882 N.W.2d 650 (2016), we have recognized the breadth of conduct addressed in § 28-707(1)(a) and have stated that "[a]s a matter of practicability for general application, child abuse statutes, by virtue of the nature of their subject matter and the nature of the conduct sought to be prohibited, usually contain broad and rather comprehensive language." *State v. Crowdell*, 234 Neb. at 474, 451 N.W.2d at 699. As explained below, we believe that given the law and evidence regarding Mendez-Osorio's conduct and the children's exposure to the incident and its aftermath, Mendez-Osorio's conviction under § 28-707(1)(a) was supported by the evidence.

Nebraska's child endangerment statute is similar to that of other jurisdictions. Case law shows that other jurisdictions have utilized misdemeanor child endangerment statutes comparable to Nebraska's statute to penalize aggressors whose conduct exposed children to domestic violence. For example, in *People v. Burton*, 143 Cal. App. 4th 447, 49 Cal. Rptr. 3d 334 (2006), the California Court of Appeal affirmed a conviction for misdemeanor child endangerment. According to *Burton, supra*, the defendant cut the child's mother in the face and although the child was not a direct witness of the attack itself, the defendant knew of the child's presence at the scene of the attack, and the child saw the immediate aftermath. Citing authorities including journal articles, the court reasoned that the child's presence and witness to the aftermath of the defendant's conduct likely caused mental suffering similar to witnessing the attack itself. *Id*.

In *People v. Johnson*, 95 N.Y.2d 368, 740 N.E.2d 1075, 718 N.Y.S.2d 1 (2000), the New York Court of Appeals held that child endangerment applied to conduct endangering the

mental health of minors even where the violent actions were not specifically targeted at the children. *Johnson* involved a domestic assault. As the episode escalated, the children hid in their bedroom while the defendant assaulted their mother in the next room. *Id*. A New York criminal statute provides that a person endangers the welfare of a child when "[h]e or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old . . . ." N.Y. Penal Law § 260.10(1) (McKinney 2017). The court in *Johnson* noted that under this statute, the crime of endangerment is defined by the risk of injury produced by the defendant's conduct. "Endangering the welfare of a child is not defined by specifically targeted acts or individuals, but by conduct which a defendant knows will present a 'likelihood' of harm to a child (i.e., with an awareness of the potential for harm)." *Id*. at 372, 740 N.E.2d at 1076, 718 N.Y.S.2d at 2.

[12] Thus, we have long agreed with the reasoning expressed in cases like *Burton* and *Johnson* to the effect that criminal endangerment in § 28-707(1)(a) encompasses not only conduct directed at the child but also conduct which presents the likelihood of injury due to the child's having been placed in a situation caused by the defendant's conduct. See *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990). We believe that by using the language "endangered" in § 28-707(1)(a), the Legislature expressed its intent to encompass, as a crime, child abuse resulting from certain conduct which exposes the child to harm even if the child was not the object of the defendant's conduct. See *State v. Graham*, 137 N.M. 197, 109 P.3d 285 (2005). That is, § 28-707(1)(a) covers both direct and indirect consequences of a defendant's conduct which place a child in a situation that endangers his life or physical or mental health. See *People v. Burton, supra*.

Our reasoning and that of the foregoing cases are supported by the academic literature. It is well established that children often witness domestic violence or its aftermath and suffer

adverse effects similar to victims of direct physical and sexual abuse. See *People v. Burton*, 143 Cal. App. 4th 447, 49 Cal. Rptr. 3d 334 (2006), citing to Gina L. Kershaw, Comment, *The Child Witness as a Victim of Domestic Violence: Prosecuting the Batterer Under California's Child Abuse Statute*, 19 J. Juv. L. 196 (1998). Nearly 20 years ago, it was noted that "[t]here are up to six million victims of domestic violence annually in the United States and half of these incidents occur in the presence of children." *People v. Burton*, 143 Cal. App. 4th at 456, 49 Cal. Rptr. 3d at 341.

Academic journals have long observed that a child's presence during domestic violence episodes has lasting health consequences even where the child did not directly observe the violence. In the article cited in *People v. Burton, supra*, it has been stated:

> Sleeping problems, and intense fears of going to bed at night have been associated with the pattern of violence in the home, since many times the abuse will occur after the child has gone to bed. This correlation secondarily indicates that children suffer the effects of domestic violence in the home, even when they are not actually in the presence of the abuse but can hear it from another room.

Kershaw, *supra* at 198. More recently, the literature indicates that exposure to domestic violence affects children's neurobiological well-being. See Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan: New Knowledge From Neuroscience*, 53 Judges' J. 32 (summer 2014).

Mendez-Osorio refers to the facts and makes several arguments to the effect that his conduct was not a crime under § 28-707(1)(a). These facts include the assertions that he did not threaten the children directly and that the children who were in the home did not witness the terrorization of Santos-Velasquez. Even assuming these facts are reflected in the record, Mendez-Osorio's arguments are unavailing.

Contrary to Mendez-Osorio's contention, a conviction under § 28-707(1)(a) does not require a direct threat by the

defendant upon the children. In this case, Mendez-Osorio's conduct caused Santos-Velasquez to flee the mobile home with the youngest children, who became upset and were made fearful by this incident. Mendez-Osorio's conduct, even if characterized as indirect, caused the children to be placed in a situation which endangered their well-being.

With respect to the contention that Mendez-Osorio's conviction under § 28-707(1)(a) is not warranted because the children did not witness the terrorization of Santos-Velasquez, we believe Mendez-Osorio misapprehends the law and we reject this argument. As we have discussed above, exposure to domestic crime can support a conviction under § 28-707(1)(a); the children need not witness the initial crime to become victims of endangerment.

An article cited in *People v. Johnson*, 95 N.Y.2d 368, 740 N.E.2d 1075, 718 N.Y.S.2d 1 (2000), observed that in this area of the law, "witnessing can be visual, auditory, or inferred from the aftermath of the violence—e.g., broken furniture, bruises, or parental apprehension when the abuser is present." Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 Harv. Women's L.J. 205, 207 (1997). In the instant case, given Santos-Velasquez' apprehension, two of the children were swept up in her flight to the neighbor's home to call law enforcement late at night and were effectively witnesses to the continuing aftermath and consequences of Mendez-Osorio's terrorization of Santos-Velasquez.

Based on the foregoing analysis of § 28-707(1)(a), and given the factual record, we determine that there was sufficient evidence upon which a rational jury could find Mendez-Osorio guilty of misdemeanor child abuse under § 28-707(1)(a), and we affirm his conviction thereunder.

### 3. Sentencing Errors

Although not asserted by either party in the appellate briefs and not discussed by the Court of Appeals, we note

plain error in two respects of the sentences imposed. As a result, we vacate the sentences and remand the cause for resentencing.

### (a) Misclassification of Use of a Weapon Conviction and Postrelease Supervision

In count II of the information, the State charged Mendez-Osorio with—and he was convicted of—a violation of § 28-1205(1), use of a deadly weapon to commit a felony when, as in this case, the weapon is not a firearm. At the time the crime occurred, § 28-1205 was a Class II felony. See § 28-1205(1)(b). The Legislature enacted 2015 Neb. Laws, L.B. 605, which became effective on August 30, 2015, prior to the events that led the State to bring charges against Mendez-Osorio and prior to sentencing. The sentencing order, however, erroneously describes the offense as a Class III felony. See § 28-1205(2)(b) (Cum. Supp. 2014). Evidently, because of this misclassification, the sentencing court went on to order postrelease supervision. This was not an authorized sentence and constituted plain error. See *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

Mendez-Osorio was convicted of terroristic threats, a Class IIIA felony, and use of a weapon, a Class II felony. Section 28-105(6) provides:

> Any person who is sentenced to imprisonment for a Class I, IA, IB, IC, ID, II, or IIA felony and sentenced concurrently or consecutively to imprisonment for a Class III, IIIA, or IV felony shall not be subject to post-release supervision pursuant to subsection (1) of this section.

The sentence imposing postrelease supervision in this case was not authorized and, in fact, contravened § 28-105(6). Compare *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017) (determining that sentence with no period of postrelease supervision complied with § 28-105(6)). Accordingly, we

must vacate the foregoing sentences for terroristic threats and use of a weapon and remand the cause for resentencing.

(b) Concurrent Sentences

We note an additional sentencing error not raised by the parties or the Court of Appeals. Although Mendez-Osorio was convicted of use of a weapon in violation of § 28-1205(1), the district court ordered all the sentences of imprisonment in this case to be served "concurrent to each other." The concurrent feature of the sentence for use of a weapon contravenes § 28-1205(3).

Section 28-1205(3) provides that "sentences imposed under this section shall be consecutive to any other sentence imposed." We have found plain error where a court ordered a sentence for use of a weapon to run concurrently to other felony sentences imposed. See *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014). See, also, *State v. McCurry, supra*. Although it is generally within the trial court's discretion to direct that sentences imposed for separate crimes be served concurrently or consecutively, § 28-1205(3) does not permit such discretion in sentencing. Instead, § 28-1205(3) mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed and concurrent with no other sentence. *State v. Ramirez, supra*.

Because § 28-1205(3) mandates that the sentence imposed for a conviction of use of a deadly weapon be consecutive to any other sentence and concurrent with no other sentence, the district court did not have the authority to order that the sentences for the conviction of use of a deadly weapon to commit a felony run concurrently with the other sentences. *State v. Ramirez, supra.* The imposition of the sentence wherein the sentences were all "concurrent to each other" was plain error. On this basis, the sentences for all convictions must be vacated and the cause remanded for resentencing.

(c) Vacation of Sentences

[13] An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced. *Id.*; *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006). Accordingly, we vacate all sentences and remand the cause for resentencing.

## VI. CONCLUSION

In this direct appeal, the Court of Appeals did not err when it rejected Mendez-Osorio's claim of ineffectiveness of trial counsel and affirmed Mendez-Osorio's conviction for misdemeanor negligent child abuse. We affirm in part the decision of the Court of Appeals affirming Mendez-Osorio's convictions on all counts. However, because the district court imposed unauthorized sentences, we vacate all sentences and remand the cause for resentencing.

Affirmed in part, and in part vacated and remanded for resentencing.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Terry P. Brown, individually, and Terry P. Brown as Trustee of the Terry Paul Brown Living Trust, appellee, v. Jacobsen Land and Cattle Company, a Nebraska corporation, appellee, and State of Nebraska ex rel. Game and Parks Commission, intervenor-appellant.

900 N.W.2d 765

Filed August 18, 2017. No. S-16-604.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Statutes: Property: Appeal and Error.** The interpretation of a statute, including the interpretation of the lis pendens statute, is a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Statutes: Property: Intent.** The scope of the lis pendens rule is determined by its end and purpose.
5. **Property: Intent.** Generally speaking, the purpose of lis pendens is to prevent third persons, during the pendency of litigation involving a property dispute, from acquiring interests in the disputed land which would preclude the court from granting the relief sought.
6. **Property: Jurisdiction: Statutes: Intent.** The lis pendens statute serves to hold disputed property within the court's jurisdiction until the parties' rights are finally determined.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
8. ____. A trial court cannot commit error in resolving an issue never presented and submitted to it for disposition.

9. **Interventions.** One who intervenes under Neb. Rev. Stat. § 25-328 (Reissue 2016) becomes a party to the litigation and has all the rights of a party.
10. **Interventions: Pleadings.** An intervenor's pleadings are governed by the same pleading rules in chapter 25 of the Nebraska Revised Statutes as govern other parties' pleadings.
11. **Interventions.** As a party to the litigation, it is generally recognized that intervenors can engage in discovery, file motions, introduce evidence, and examine witnesses.
12. **Property: Parties.** When a subsequent purchaser under the lis pendens statute becomes a party in an action involving the disputed property, he or she is entitled to question the plaintiff's right to recover in the same manner as the original defendant.
13. ____: ____. A subsequent purchaser under the lis pendens statute occupies the same position as the original defendant and is entitled to no greater rights of defense.
14. ____: ____. The lis pendens rules do not confer any additional substantive rights on parties to a property dispute, but neither do they restrict the rights of parties to defend their interests in the litigation.
15. **Actions: Property: Parties.** The lis pendens statute does not relieve the plaintiff from making parties to an action all persons having an interest in the property when the action is commenced, if such interest is known to him or her.
16. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.

Appeal from the District Court for Banner County: Derek C. Weimer, Judge. Reversed and remanded for a new trial.

Douglas J. Peterson, Attorney General, and Charles E. Chamberlin for intervenor-appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., for appellee Terry P. Brown.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

This appeal involves the interplay between Nebraska's lis pendens statute[1] and Nebraska's intervention statutes.[2] The primary question presented is whether the right of an intervenor to offer evidence in a quiet title action is restricted by the lis pendens statute. We conclude it is not, and because the intervenor in this case was not permitted to offer evidence at trial, we reverse the judgment and remand this matter for a new trial.

## FACTS

Jacobsen Land and Cattle Company (Jacobsen) is the record owner of land in Banner County, Nebraska. Terry P. Brown, individually, and Terry P. Brown as trustee of the Terry Paul Brown Living Trust, owns property adjacent to the Jacobsen's property. For many years, approximately 80 acres of Jacobsen's land has been fenced in with Brown's property (the disputed property).

In October 2014, Jacobsen and the Nebraska Game and Parks Commission (State) entered into a purported purchase agreement for the sale of a parcel of Jacobsen's land that included the disputed property. Pursuant to a warranty deed executed February 10, 2015, Jacobsen conveyed title to the subject real estate to the State. The deed was recorded on February 13.

### Lis Pendens and Quiet Title Action

After Jacobsen and the State entered into the purchase agreement, but before closing occurred, Brown filed and recorded a lis pendens with the Banner County register of deeds. The lis pendens recited that a quiet title action had been filed in the district court for Banner County, identified Brown

[1] Neb. Rev. Stat. § 25-531 (Reissue 2016).

[2] Neb. Rev. Stat. §§ 25-328 to 25-330 (Reissue 2016).

as the plaintiff and Jacobsen as the defendant, and identified the disputed property by full legal description.

Shortly before filing the lis pendens, Brown filed a quiet title action against Jacobsen in the district court for Banner County, alleging ownership by adverse possession of the disputed property. Jacobsen filed an answer denying Brown's claim of adverse possession and setting forth several affirmative defenses.

### Complaint in Intervention

The State subsequently moved for leave to intervene in the quiet title action between Brown and Jacobsen. In its motion, the State alleged it was the current owner of record of the disputed property and had a "direct interest in the subject matter in this litigation and the outcome of this litigation, as required by . . . § 25-328." The State also alleged that when the quiet title action was filed, it "held equitable title in the disputed property" by virtue of having entered into an agreement to purchase the property.[3] The State alleged it had expended substantial state and federal funds in the acquisition and improvement of the disputed property, and would be "liable to reimburse federal dollars" in the event Brown was successful in the litigation. Finally, the State alleged that its interests "may not be adequately represented" by Jacobsen and that it had "a duty to defend State owned property from claims of encroachment or quiet title actions."

Jacobsen did not object to the State's request to intervene in the quiet title action, but Brown did. In an order entered July 15, 2015, the court allowed the State to intervene over Brown's objection. The court acknowledged Brown's argument that the lis pendens statute prevented the State from acquiring any legal interest in the disputed property while the action was pending, but concluded "the State should be permitted to

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[3] See, generally, *DeBoer v. Oakbrook Home Assn.*, 218 Neb. 813, 359 N.W.2d 768 (1984).

intervene to protect whatever interest it may have in some or part of this real estate."

Thereafter, the State filed what it captioned "Defendant-Interven[o]r's Answer to Plaintiff's Amended Complaint," in which it aligned with Jacobsen in defending against Brown's claim of adverse possession. The State's answer denied the allegations of Brown's complaint and set forth several affirmative defenses to the claim of adverse possession. Most of the State's affirmative defenses were similar to those asserted by Jacobsen in its answer, but the State also alleged the affirmative defenses of laches, unclean hands, and defects in the lis pendens notice.

### Brown's Motion for Partial Summary Judgment

Brown moved for partial summary judgment against the State, arguing application of the lis pendens statute prevented the State from acquiring any direct and legal interest in the disputed property. After a hearing, the district court granted Brown's motion in part, finding as a matter of law that (1) Brown had complied with the lis pendens statute and the notice filed was legally sufficient and effective and (2) the State was a "subsequent purchaser" under the lis pendens statute and as such could take only "whatever title [Jacobsen] had to give at the time the warranty deed was executed and recorded." However, the court's order granting partial summary judgment did not dismiss the State from the quiet title action or make any findings regarding the merits of the adverse possession claim.

### Jacobsen Stops Defending Quiet Title Action

Before trial, Jacobsen's counsel advised the court that his client had asked him not to participate in the pretrial conference or the trial and had consented to his withdrawal from the case. Jacobsen's counsel indicated that his client's intent

was "to not participate further in this case" and "not to hire another attorney." No party objected, and the court allowed Jacobsen's counsel to withdraw. Jacobsen did not thereafter participate in the litigation and did not appear for trial.

### State's Motion to Modify Progression

After Jacobsen ceased participating in the action, the State moved to modify the case progression plan and to continue the pretrial conference. The State claimed that it needed additional time to prepare for trial and argued that because Jacobsen was no longer participating in the case, the State needed to conduct formal discovery so that it could defend against Brown's claim of adverse possession.

Brown opposed modifying the progression order. He argued the State had only the rights of a subsequent purchaser under the lis pendens statute and could not "step into [Jacobsen's] shoes" and defend against Brown's claim of adverse possession. The court overruled the motion to modify the progression order, but took the opportunity to summarize its earlier rulings and explain how it viewed the State's interest in the action going forward.

The court acknowledged the State had an interest in the outcome of the quiet title action sufficient to support intervention, but agreed with Brown that the State's interest was limited to "that of a subsequent purchaser as defined in the lis pendens statutes." The court reasoned:

> [T]he State . . . is the subsequent purchaser of whatever real estate [Jacobsen] had to sell to it at the time of the closing of their real estate transaction. The State was not dismissed from the action, but its role is limited to that of a subsequent purchaser which does not put it in the "same shoes" as [Jacobsen].

The court concluded that, given the State's status as a subsequent purchaser under the lis pendens statute, it "would not have a defense as to the issues pending between [Brown] and

[Jacobsen]," because Brown's claims of adverse possession predated the purchase agreement. The court observed that after the quiet title action was resolved, the State could then "pursue whatever remedies it may have under the purchase agreement between it and [Jacobsen]." The matter proceeded to pretrial conference as scheduled.

### Pretrial Conference

Only the State and Brown appeared for the pretrial conference. When the State indicated it planned to call witnesses to contest Brown's claim of adverse possession, Brown objected. He argued that permitting the State to offer evidence would be contrary to the court's determination that the State took no interest in the property pursuant to the lis pendens statute and would impermissibly allow the State to stand in the shoes of Jacobsen for purposes of challenging the elements of adverse possession. The State countered that it would be defending its own interests in the property and would be challenging Brown's adverse possession claim to the extent that claim impacts the interest the State would receive from Jacobsen.

Ultimately, citing the State's status as a subsequent purchaser under lis pendens, the court concluded the State would not be allowed to present evidence or question witnesses at trial related to the claim of adverse possession.

### Trial

The quiet title action was tried to the bench on May 11, 2016. Jacobsen did not appear for trial. Brown offered evidence in support of the adverse possession claim. No party offered evidence in opposition to the claim, but the State was permitted to make several offers of proof.

In an order entered May 18, 2016, the court found Brown had met his burden of proving adverse possession of the disputed property. The court quieted title to the disputed property in Brown as against Jacobsen and any other persons or entities claiming any interest therein.

The State timely appealed, and we moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

## ASSIGNMENTS OF ERROR

The State assigns, renumbered and restated, that the district court erred in (1) determining that the lis pendens operated to make the State a subsequent purchaser or, in the alternative, refusing to cancel the lis pendens; (2) determining that the State had a sufficient interest to intervene in the action, but did not have a sufficient interest to resist Brown's claim of adverse possession; (3) determining that equitable title to the disputed property would not affect the State's interest in Brown's claims and its ability to defend against the claims; (4) determining that Brown had met his burden of proving adverse possession of the disputed real property; and (5) refusing to modify the case progression order.

## STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity.[5] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[6]

[3] The interpretation of a statute, including the interpretation of the lis pendens statute, is a question of law.[7] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[8]

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[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[5] *Poullos v. Pine Crest Homes*, 293 Neb. 115, 876 N.W.2d 356 (2016).

[6] *Id.*

[7] See *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014).

[8] *Id.*

## ANALYSIS

One of the central questions raised on appeal is whether the right of an intervenor to participate and offer evidence in a quiet title action is restricted by application of the lis pendens statute. To answer this question, we begin by reviewing the history and purpose of lis pendens under Nebraska law.

### Lis Pendens

Under the common-law doctrine of lis pendens (literally "'[a] pending lawsuit'"[9]), the mere pendency of a suit affecting title to real property was constructive notice to the world of the disputed claim.[10] Nebraska codified the common-law doctrine of lis pendens early in its history.

Prior to 1887, Nebraska's lis pendens statute "was a legislative adoption of the equity rule of *lis pendens* that had existed from time immemorial,"[11] and the rule applied to give notice of the disputed claim once a suit was commenced. Under the rule then in effect, a suit was commenced upon service of summons.[12] This application proved problematic, because persons aware of the filing of a complaint but not yet served with summons could freely alienate the property and preclude a court from awarding the relief requested in the complaint.[13] To address this problem, the Legislature amended the lis pendens statute in 1887 to permit a plaintiff to record a notice of lis pendens with the register of deeds at or near the time of filing the complaint and thereby give notice of the disputed claim and bind any subsequent purchaser to the outcome of

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[9] *Id.* at 904, 852 N.W.2d at 724.

[10] *Kelliher v. Soundy, supra* note 7.

[11] *Sheasley v. Keens*, 48 Neb. 57, 63, 66 N.W. 1010, 1012 (1896), *overruled on other grounds, Munger v. Beard & Bro.*, 79 Neb. 764, 113 N.W. 214 (1907).

[12] *Kelliher v. Soundy, supra* note 7.

[13] *Id.*

the proceedings. The current lis pendens rule is codified in § 25-531 and provides in relevant part:

> When the [lis pendens] summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency. While the action is pending no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title. In all actions brought to affect the title to real property, the plaintiff may either at the time of filing his or her complaint or afterwards, file, or in case any defendant sets up an affirmative cause of action and demands relief which shall affect the title to real estate, he or she may, at the time of filing such answer or at any time afterwards, file with the clerk or register of deeds of each county in which the real estate thus to be affected, or any part thereof, is situated, a notice of the pendency of such action. The notice shall contain the names of the parties, the object of the action, and a description of the property in such county sought to be affected thereby. . . . The clerk or register of deeds of such county shall record the notice . . . . From the time of filing such notice the pendency of such action shall be constructive notice to any purchaser or encumbrancer to be affected thereby. Every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or encumbrancer and shall be bound by all proceedings taken in the action after the filing of such notice to the same extent as if he or she were made a party to the action. The court in which such action was commenced or any judge thereof may at any time thereafter on the application of any person aggrieved, on good cause shown, and on such notice as the court or judge may determine, order the notice to be canceled by the clerk or register of deeds of any county in which the notice may have been filed or recorded by filing a notice of release.

[4-6] We have recognized that "[t]he scope of the [lis pendens] rule is determined by its end and purpose."[14] Generally speaking, the purpose of lis pendens is to prevent third persons, during the pendency of litigation involving a property dispute, from acquiring interests in the disputed land which would preclude the court from granting the relief sought.[15] In other words, the lis pendens statute serves to hold disputed property within the court's jurisdiction until the parties' rights are finally determined.[16] In *Hadley v. Corey*,[17] we explained:

> "In a legal sense the term (*lis pendens*) is equivalent to the maxim that pending the suit nothing should be changed (pendente lite nihil innovetur); and the doctrine of *lis pendens* is that one who acquires any interest in property during the pendency of litigation respecting such property from a party to the litigation takes subject to the decree of judgment in such litigation and is bound by it."

With the purpose and effect of the lis pendens rule in mind, we turn to the State's assignments of error.

## State Is Subsequent Purchaser Under § 25-531

In its first assignment, the State asserts the district court erred in finding it is a subsequent purchaser under the lis pendens statute. Alternatively, the State asserts that even if it is a subsequent purchaser, the district court erred in not canceling the lis pendens. We find no merit to this assignment.

The plain language of the lis pendens statute provides that once a lis pendens notice is filed, "[e]very person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser

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[14] *Merrill v. Wright*, 65 Neb. 794, 797, 91 N.W. 697, 699 (1902).

[15] *Id*.

[16] See *id*.

[17] *Hadley v. Corey*, 137 Neb. 204, 215, 288 N.W.2d 826, 832 (1939).

or encumbrancer and shall be bound by all proceedings taken in the action . . . ."[18] Brown filed and recorded the lis pendens on February 4, 2015, and it contained the names of the parties, the object of the action, and a description of the disputed property. The State does not argue on appeal that Brown failed to comply with any aspect of the lis pendens statute.

The record shows that the warranty deed from Jacobsen to the State was executed February 10, 2015, and recorded February 13. Because the execution and recording of the deed conveying the disputed property occurred after the lis pendens was filed, the district court was correct in finding the State was a subsequent purchaser under § 25-531.

[7,8] Regarding the State's alternative assignment, we note that § 25-531 permits a court to cancel a lis pendens notice "on the application of any person aggrieved, on good cause shown." The record indicates the State mentioned the availability of such relief once during argument to the court, but nothing in the record shows the State ever moved for such relief. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court,[19] because a trial court cannot commit error in resolving an issue never presented and submitted to it for disposition.[20] As such, we do not address the State's argument that the lis pendens should have been canceled.

### As Intervenor and Subsequent Purchaser, State Had Right to Offer Evidence

After finding the State had sufficient interest to intervene in the action, the district court concluded the State's status as a subsequent purchaser under the lis pendens statute prevented the State from presenting evidence related to the

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[18] § 25-531.

[19] *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009).

[20] *Id*.

adverse possession claim. It reasoned the "State's interest in this lawsuit [is that of] the subsequent purchaser of whatever real estate [Jacobsen] had to sell to it at the time of the closing [and] its role is limited to that of a subsequent purchaser which does not put it in the 'same shoes' as [Jacobsen]."

To determine whether an intervenor's right to participate in an action and offer evidence is restricted by virtue of its status as a subsequent purchaser under the lis pendens statute, we begin by reviewing the general rights of one intervening in an action under § 25-328. That statute provides in relevant part:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to the action, or against both, in any action pending . . . in any of the courts in the State of Nebraska, may become a party to an action . . . either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff . . . .

[9-11] The plain language of § 25-328 provides that one who intervenes becomes "a party" to the action, and our case law recognizes as much. We have held that one who intervenes under § 25-328 becomes a party to the litigation and has all the rights of a party.[21] An intervenor's pleadings are governed by the same pleading rules in chapter 25 of the Nebraska Revised Statutes as govern other parties' pleadings.[22] And, as a party to the litigation, it is generally recognized that intervenors "can engage in discovery, file motions, introduce evidence, and examine witnesses."[23]

Here, the district court interpreted the lis pendens statute to limit the rights of a party who intervenes as a subsequent

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[21] *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959). See, also, John P. Lenich, Nebraska Civil Procedure § 16:9 (2008).

[22] § 25-330.

[23] Lenich, *supra* note 21, § 16:9 at 620.

purchaser. Specifically, the court concluded that because the State was a subsequent purchaser under the lis pendens statute, it could not "stand in the shoes" of Jacobsen and therefore could not offer any evidence opposing Brown's adverse possession claim. We reject this broad proposition, because it is contrary to our case law and cannot be reconciled with our settled jurisprudence on the rights of intervenors.

[12,13] In *Hadley v. Corey*, we recognized that when a subsequent purchaser under the lis pendens statute becomes a party in an action involving the disputed property, he or she is "entitled to question [the] plaintiff's right to recover in the same manner as the original defendant."[24] We added that a subsequent purchaser "occupies the same position as the original defendant and is entitled to no greater rights of defense."[25]

When the State intervened in this quiet title action, it became a party.[26] The district court's conclusion that the State could not "stand in the shoes" of Jacobsen or offer any evidence to defend against the claim of adverse possession was not only incompatible with the rights of a subsequent purchaser under *Hadley*, it was also incompatible with the State's right as an intervenor.

As an intervening party to the litigation, the State should have been permitted to engage in discovery, file motions, introduce evidence, and examine witnesses just like any other party.[27] The State was entitled to oppose Brown's adverse possession claim in the same manner as Jacobsen.[28] The fact that Jacobsen effectively withdrew from the litigation made it even more critical that the State be allowed to defend against Brown's adverse possession claim by questioning witnesses and offering evidence.

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[24] *Hadley v. Corey, supra* note 17, 137 Neb. at 215, 288 N.W.2d at 832.

[25] *Id*.

[26] See, § 25-328; *Kirchner v. Gast, supra* note 21.

[27] See Lenich, *supra* note 21.

[28] See *Hadley v. Corey, supra* note 17.

[14] Lis pendens is a procedural mechanism intended to alert prospective purchasers about property disputes and protect the status quo until the parties' substantive property rights can be determined in litigation.[29] It is true the lis pendens rules do not confer "any additional substantive rights" on parties to a property dispute,[30] but neither do they restrict the rights of parties to defend their interests in the litigation.

[15] Our holding in *Munger v. Beard & Bro.*[31] further illustrates that the lis pendens statute does not operate to prevent a subsequent purchaser from fully participating as a party in a quiet title action affecting the subject property. In *Munger*, we stated:

> The statute of *lis pendens* does not relieve the plaintiff from making parties to an action all persons having an interest in the property when the action is commenced, if such interest is known to him. . . . [T]he intent of the legislature [is] to give the plaintiff the benefit of a *lis pendens* notice as against parties holding secret liens, and not against those whose liens or interests were actually known to him. . . . [H]aving such actual notice [of the mortgagor's interest,] it was [the plaintiff's] duty to make her a party [so] that her rights might be litigated.[32]

*Munger* suggests that a subsequent purchaser who is known to the plaintiff must not only be allowed to participate as a party in an action commenced regarding the property, but should be joined as a necessary party in the action. In the present case, it is not necessary to address whether the State was a necessary or indispensable party[33] to the quiet title action, because the State intervened and thereby became a party to the action.

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[29] See 51 Am. Jur. 2d *Lis Pendens* § 2 (2011).

[30] *Kelliher v. Soundy, supra* note 7, 288 Neb. at 905, 852 N.W.2d at 724.

[31] *Munger v. Beard & Bro., supra* note 11.

[32] *Id.* at 774-75, 113 N.W. at 218.

[33] See *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017).

We conclude that once the State intervened as a party to the quiet title action, it was error not to allow the State to participate fully and offer evidence.

[16] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.[34] In the present case, the State was precluded from offering any evidence opposing Brown's claim of adverse possession. A trial court always has discretion to limit evidence which is irrelevant,[35] needlessly cumulative,[36] or unfairly prejudicial,[37] but here, the court did not rely on any evidentiary rule to limit the State's ability to offer evidence, and instead relied solely on the State's status as a subsequent purchaser under the lis pendens statute to preclude all offers of evidence. This error unfairly prejudiced the State's right to participate fully as an intervening party in the litigation and effectively prevented the State from defending its interest as a subsequent purchaser of the disputed property.

We therefore reverse the judgment of the district court and remand the matter for a new trial. Because of our disposition, we do not reach the State's remaining assignments of error.

## CONCLUSION

For the foregoing reasons, we reverse the judgment and remand this matter for a new trial.

Reversed and remanded for a new trial.

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[34] *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

[35] Neb. Rev. Stat. § 27-402 (Reissue 2016).

[36] Neb. Rev. Stat. § 27-403 (Reissue 2016).

[37] *Id.*

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Daniel Lee Jones, appellant.

900 N.W.2d 757

Filed August 18, 2017. No. S-16-1001.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Constitutional Law: Sentences.** Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
5. **Constitutional Law: Minors: Homicide: Sentences.** The Eighth Amendment forbids a state sentencing scheme that mandates life in prison without the possibility of parole for a juvenile offender convicted of homicide.
6. **Minors: Homicide: Sentences.** A sentencing court must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile convicted of a homicide.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Julie E. Bear, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller-Lerman, J.

## NATURE OF CASE

Daniel Lee Jones pled no contest to first degree murder in 1999 and was sentenced to imprisonment for life. Jones was 16 years old at the time of the murder, and therefore, his life sentence was vacated in 2015 pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and he was granted a resentencing. After a hearing, the district court for Sarpy County resentenced Jones to imprisonment for 80 years to life. Jones appeals his resentencing. We affirm.

## STATEMENT OF FACTS

Jones was charged with first degree murder and use of a weapon to commit a felony in connection with the stabbing death of Scott Catenacci. Jones' birth date is November 7, 1981. The killing occurred on or about September 29, 1998. Pursuant to a plea agreement, Jones pled no contest to first degree murder and the State dismissed the use of a weapon charge. The factual basis presented by the State at the plea hearing indicated that Jones, in concert with other defendants, had attacked Catenacci and stabbed him to death. The attack on Catenacci, having been discussed several days beforehand, was premeditated, deliberate, and malicious. Jones stabbed Cateneacci several times, and Catenacci died as a result of the wounds. Jones was convicted, and on June 28, 1999, the district court sentenced him to imprisonment for life.

Jones' first direct appeal was dismissed for failure to pay the statutory docket fee, but Jones obtained a new direct appeal as postconviction relief. Jones' conviction and sentence were affirmed by this court in the new direct appeal. *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007).

On June 25, 2012, the U.S. Supreme Court held in *Miller, supra*, that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465. Although the Court in *Miller* concluded that the Eighth Amendment prohibited a mandatory life sentence without parole, the Court allowed the possibility that a juvenile convicted of a homicide offense could be sentenced to life in prison, but only after "consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." See *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 725, 193 L. Ed. 2d 599 (2016). In response to *Miller*, the Nebraska Legislature enacted Neb. Rev. Stat. § 28-105.02 (Reissue 2016), which, inter alia, sets forth mitigating factors that a court must consider when sentencing a juvenile convicted of a Class IA felony. In *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014), we held that the rule announced in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), applied retroactively to a case on collateral review. See, also, *Montgomery, supra*.

On June 21, 2013, Jones, who was 16 years old at the time of the murder, filed a motion for postconviction relief based on *Miller*. After this court's holding in *Mantich* and after an evidentiary hearing, the district court on July 9, 2015, sustained Jones' motion and, as postconviction relief, vacated his sentence and set the matter for resentencing.

In August 2016, the court held a mitigation hearing as part of the resentencing. At the mitigation hearing, Jones presented evidence including the deposition testimony of a certified child and adult psychologist regarding adolescent brain development and the significant differences between juveniles and adults. Jones presented live testimony of witnesses including Jones' sister, who testified regarding Jones' childhood experiences and his home and family life while growing up. She generally testified that the family moved

frequently during Jones' childhood and mostly lived in areas of poor socioeconomic status that were prone to crime and gang violence, that Jones never knew or was involved with his father when growing up, that their mother had a succession of boyfriends who were abusive, and that Jones had very little supervision and ended up going "along with the [wrong] crowd." Jones also presented testimony by a unit manager in the prison where Jones was incarcerated that Jones was quiet, followed the rules, and was not a problem inmate. Jones also presented testimony by a clinical psychologist who had performed a comprehensive mental health evaluation of Jones for purposes of the mitigation hearing. He testified regarding various findings with respect to Jones' mental and psychological functioning and his neuropsychological development. He further testified, inter alia, that Jones had matured over time and had supports in place for employability and residence in the community. He opined in a report that Jones was at a low risk for future violence.

The district court resentenced Jones on October 3, 2016. At the sentencing hearing, the court stated that it had considered Jones'

> age, now and at the time of the offense, his mentality, education, experience, social and cultural background, past criminal record or record of law-abiding conduct, the motivation for the offense, as well as the nature and severity of the offense and the significant amount of violence involved in the commission of the crime.

The court stated that it had also considered, inter alia,

> all of the evidence adduced at the mitigation hearing, including, but not limited to, the expert testimony, the pertinent case law, including, but not limited to, the rationale underlying the case [*Miller, supra*], . . . the records of the Department of Corrections concerning [Jones'] actions and behavior while incarcerated,

and "the factors set forth in [§] 28-105.02(2)." The court also noted that the crime committed by Jones "was an extremely

heinous crime" involving a "brutal, brutal murder" and that Jones had "participated both in planning and the execution of the crime." The court concluded that "a sentence of some severity is required but not such severity that [Jones] would never have hope of being released from prison." The court resentenced Jones to imprisonment for 80 years to life with credit for time served and statutory parole eligibility at age 56.

Jones appeals the district court's resentencing.

## ASSIGNMENTS OF ERROR

Jones claims, restated and summarized, that his sentence of 80 years' to life imprisonment with parole eligibility at age 56 is excessive and, in particular, that the court (1) abused its discretion by imposing a de facto life sentence which violated constitutional protections against cruel and unusual punishment and denied him a meaningful opportunity for release based upon demonstrated maturity and rehabilitation, (2) violated his constitutional due process rights when it failed to make specific findings to demonstrate that it adequately considered his age-related characteristics, and (3) violated his constitutional rights against cruel and unusual punishment by imposing a sentence which was not proportional.

## STANDARDS OF REVIEW

[1,2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Jackson, ante* p. 22, 899 N.W.2d 215 (2017); *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

[3,4] Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents a question of law. *State v. Nollen*, 296 Neb. 94, 892 N.W.2d 81

(2017). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id*.

## ANALYSIS

[5,6] In *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the U.S. Supreme Court held the Eighth Amendment forbids a state sentencing scheme that mandates life in prison without the possibility of parole for a juvenile offender convicted of homicide. *Miller* did not "categorically bar" the imposition of a sentence of life imprisonment without parole, but, instead, "held that a [sentencing court] must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile" convicted of a homicide. *Mantich*, 287 Neb. at 339-40, 842 N.W.2d at 730. We have previously held, in *Mantich*, that *Miller* applied retroactively and that therefore, any juvenile sentenced to mandatory life imprisonment without parole could have his or her sentence vacated and the cause remanded for resentencing.

In response to *Miller*, the Nebraska Legislature amended the sentencing laws for juveniles convicted of first degree murder.

Section 28-105.02, which applies to this case, provides as follows:

> (1) Notwithstanding any other provision of law, the penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment.
>
> (2) In determining the sentence of a convicted person under subsection (1) of this section, the court shall consider mitigating factors which led to the commission of the offense. The convicted person may submit mitigating factors to the court, including, but not limited to:

(a) The convicted person's age at the time of the offense;

(b) The impetuosity of the convicted person;

(c) The convicted person's family and community environment;

(d) The convicted person's ability to appreciate the risks and consequences of the conduct;

(e) The convicted person's intellectual capacity; and

(f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history.

With these principles in mind, we analyze Jones' assignments of error, each of which challenges the appropriateness of the sentence imposed at the resentencing.

*The Sentencing Court Did Not Impose a De Facto Life Sentence in Violation of the Eighth Amendment and Neb. Const. art. I, §§ 9 and 15.*

Jones asserts that his sentence of 80 years' to life imprisonment "is the functional equivalent of life without parole." Brief for appellant at 27. In this regard, at the sentencing hearing, Jones submitted and the district court considered life expectancy information for the purpose of illustrating that convicted persons incarcerated in their youth can expect a shorter lifespan. Jones contends that convicted persons incarcerated in their youth may never reach parole eligibility age or that if they reach parole eligibility at an advanced age, the sentence is tantamount to a life sentence. Jones similarly contends that a "geriatric parole" does not afford him an opportunity for meaningful release. *Id*.

We have recently considered and rejected these contentions. In *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017), we declined to find that life expectancy is the sole controlling issue, but we acknowledged that it is a matter the sentencing court can consider. In *Smith*, we also concluded that U.S. Supreme Court precedent indicated that the "meaningful opportunity" requirement requires a "meaningful and realistic opportunity to obtain release" from prison but did not refer to the enjoyment of life after release. 295 Neb. at 979, 892 N.W.2d at 66.

We continue to believe our conclusions in *Smith* are sound, and we apply them here. In this regard, we note that when resentencing Jones, the district court explicitly considered Jones' anticipated release and intended to give Jones "hope of being released from prison." Given the record and our jurisprudence, we find no merit to Jones' contention that his parole eligibility at age 56 is unconstitutional.

*The District Court Did Not Err When It Did Not Make Specific Findings of Fact Regarding Age-Related Characteristics.*

Jones contends that his constitutional rights to due process were violated because the district court did not make specific findings regarding age-related characteristics. We recently considered and rejected a comparable argument in *State v. Garza*, 295 Neb. 434, 888 N.W.2d 526 (2016). In *Garza*, we stated, "[The appellant] argues that when the sentencing court imposed the 90-to-90-year sentence, it failed to make a specific finding that [he] was that '"rare juvenile offender whose crime reflects irreparable corruption"' as opposed to '"transient immaturity."'" 295 Neb. at 447, 888 N.W.2d at 534. Like the defendant in *Garza*, because Jones was not sentenced to life imprisonment without parole, we find no merit to Jones' argument that the sentencing court was required to make specific findings including a finding regarding "irreparable corruption." See, also, *State v. Jackson, ante*

p. 22, 899 N.W.2d 215 (2017); *State v. Nollen*, 296 Neb. 94, 892 N.W.2d 81 (2017); *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014).

Jones suggests that other courts have chosen to require findings of fact. Compare *Sen v. State*, 301 P.3d 106 (Wyo. 2013) (stating in case imposing life sentence without parole that findings of fact are generally indicated). However, as Jones acknowledges, *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), did not impose a formal fact-finding requirement where the sentence includes the possibility of parole. Accordingly, we continue to adhere to our previously announced jurisprudence in this area.

We have reviewed the record and the resentencing court's order. By the announcement of its consideration of the factors in § 28-105.02(2), not repeated here, as well as the customary factors in imposing sentences, we believe the sentencing court met the due process required by the Constitution, *Miller*, and *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

*The Sentence Is Not Unconstitutionally Disproportionate.*

Jones argues that in his case, the punishment does not fit the offender, based on "'the basic "precept of justice that punishment for crime should be graduated and proportioned"' to both the offender and the offense." See *Miller*, 567 U.S. at 469.

Jones urges us to give considerable weight to his youth because, although his age was considered in sentencing, he claims that his crime reflects "'"unfortunate yet transient immaturity"'" and that thus, his sentence still violates the Eighth Amendment. See *Montgomery*, 577 U.S. at 208. In *Montgomery*, the Court recognized that because of a juvenile homicide offender's "'diminished culpability and heightened capacity for change,'" it should be uncommon to deny a juvenile offender parole except in cases involving "the rare

juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." 577 U.S. at 208. Jones compares his sentence to those of other juvenile homicide offenders and contends that his prior immaturity at age 16, coupled with improved behavior since his coming of age, establishes his capacity for remorse and reform.

In this regard, at the sentencing hearing, Jones submitted and the court considered a matrix of sentences imposed on other juveniles resentenced in Nebraska under *Miller*. Jones suggests his sentence was comparatively more severe. We do not agree.

We have previously considered and rejected a broad proportionality claim in *Mantich, supra*. In *Mantich*, we stated:

> The Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." The U.S. Supreme Court has characterized this as a "'narrow proportionality principle'" which "'does not require strict proportionality between crime and sentence'" but, rather, "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'"

287 Neb. at 353-54, 842 N.W.2d at 738.

In this case, we recognize Jones' youthful status in that he was 6 weeks shy of his 17th birthday when he participated in the murder. However, evidence showed Jones planned the murder in advance, executed the crime, and, after seeing it through to completion, undertook acts of concealment, including disposing of the knife used during the murder and lying to the police. Jones' actions were not merely youthful impulse; they were calculated, malicious, and violent. The sentencing court stated "a sentence of some severity" was required. We agree with the sentencing court that the sentence is appropriate for the offense and offender. We therefore conclude that the sentence was not disproportionate under the Eighth Amendment.

## CONCLUSION

The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of a convicted person's demeanor and attitude and all of the facts and circumstances surrounding his life. The sentencing court adhered to these principles. Upon our review of the record, we conclude that Jones' sentence of 80 years' to life imprisonment with parole eligibility at age 56 is in accordance with constitutional principles; *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); and § 28-105.02, and we therefore affirm Jones' sentence.

Affirmed.

Nebraska Supreme Court
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# Mary Cohan and Terry Cohan, individually and as wife and husband, appellants and cross-appellees, v. Medical Imaging Consultants, P.C., et al., appellees and cross-appellants.

902 N.W.2d 98

Filed August 25, 2017. No. S-16-145.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Supplemental opinion: Former opinion modified. Motions for rehearing overruled.

Richard J. Rensch and Sean P. Rensch, of Rensch & Rensch Law, P.C., L.L.O., for appellants.

David D. Ernst and Kellie Chesire Olson, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees Medical Imaging Consultants, P.C., and Robert M. Faulk, M.D.

William R. Settles and Kate Geyer Johnson, of Lamson, Dugan & Murray, L.L.P., for appellees Bellevue Obstetrics and Gynecology Associates, P.C., et al.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Per Curiam.

We consider the appellees' motions for rehearing concerning our opinion in *Cohan v. Medical Imaging Consultants*.[1] We overrule the motions, but we modify the original opinion as follows:

In the section of the opinion designated "3. Cross-Appeals by Appellees," we add a sentence at the end of the first paragraph,[2] such that the paragraph reads as follows:

> Appellees' cross-appeals assign as error the admission of Dr. Naughton's testimony. Appellees moved to strike Dr. Naughton's testimony because they claimed that only Mary's prognosis at the time of trial was relevant and that Nebraska did not recognize a theory of recovery based upon loss of chance. The district court, in overruling the motions to strike, found that Dr. Naughton's opinion was relevant for the limited purpose of establishing that early discovery of cancer leads to a better prognosis. We understand the district court to have used "prognosis" to refer to the risk of recurrence and the probability of an improved outcome.

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motions for rehearing overruled.

Funke, J., not participating.

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[1] *Cohan v. Medical Imaging Consultants, ante* p. 111, 900 N.W.2d 732 (2017).

[2] *Id.* at 129-130, 900 N.W.2d at 744.

Nebraska Supreme Court
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# In re Estate of Eldon R. Psota, deceased. Sharlene Psota, appellant, v. James Psota and Janice Brown, Copersonal Representatives of the Estate of Eldon R. Psota, deceased, appellees.

900 N.W.2d 790

Filed August 25, 2017. No. S-16-873.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Decedents' Estates: Contracts: Waiver.** Neb. Rev. Stat. § 30-2316 (Reissue 2016) applies when determining whether a surviving spouse has waived rights to the property or estate of a decedent spouse by signing a written contract, agreement, or waiver.
4. **Statutes: Legislature: Presumptions.** In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.
5. **Statutes: Legislature: Presumptions: Intent.** The Legislature is presumed to know the language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.
6. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
7. **Decedents' Estates: Waiver: Proof.** Under the plain language of Neb. Rev. Stat. § 30-2316(b) (Reissue 2016), a surviving spouse must satisfy the requirements of both subsections (b)(1) and (b)(2) in order to prove a waiver signed by the surviving spouse is unenforceable.

Appeal from the County Court for Valley County: Alan L. Brodbeck, Judge. Affirmed.

Michael J. O'Bradovich, P.C., for appellant.

Mark L. Eurek, of Law Office of Mark L. Eurek, P.C., for appellee Janice Brown.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

Sharlene Psota filed an application to be treated as an omitted spouse under a section of the Nebraska Probate Code[1] after her husband Eldon R. Psota made no provision for her in his will. The copersonal representatives of Eldon's estate resisted the application, arguing Sharlene waived all her rights to Eldon's estate in a prenuptial agreement. The probate court denied the application, and Sharlene filed this appeal. We affirm the decision of the probate court.

## FACTS

Sharlene and Eldon married on September 24, 2011. It was a second marriage for both parties, and each had children from a prior marriage. Approximately 1 week before their wedding, Eldon suggested a prenuptial agreement, and Sharlene agreed. Six days before the wedding, they met with an attorney selected by Eldon. A few days later, they met with the attorney again and reviewed a draft prenuptial agreement. Sharlene requested revisions to the agreement, which the attorney incorporated. They returned to the attorney's office the day before their wedding and signed the final agreement.

As pertinent to the issues on appeal, the agreement recited that "both parties are desirous of completely and absolutely disclaiming any right of inheritance or any interest of any

[1] See Neb. Rev. Stat. § 30-2320 (Reissue 2016).

nature whatsoever in and to the property of the other party that was accumulated prior to their forthcoming marriage." It further provided that "each party has made frank and full disclosure each to the other of all property of every nature whatsoever that they now hold." The agreement provided that each party "absolutely and completely" disclaimed "any interest of any nature whatsoever" that he or she had in the real and personal property of the other and acknowledged that "full and complete disclosure" had been made of all property owned by the other.

The agreement recited that attached as "Exhibit 'A'" was Eldon's "statement of the property" and his "most recent income tax return" and attached as "Exhibit 'B'" was Sharlene's statement of property and most recent income tax return. Both exhibits were attached to the agreement and contained lists of each party's real property, without any valuations. Neither exhibit listed any personal property, and no income tax returns were attached. With respect to the property disclosures, the agreement provided: "Each party understands that said [property] statements are made in general terms, and that each party does agree and acknowledge that [he or she does], in fact, have personal knowledge of the full extent of the other's property, and that said [property lists] are only representative in nature." The agreement further stated that each party

> shall have the right to dispose of [his or her] entire estate and each does waive any and all interest of any nature whatsoever upon the estate of the other, and each specifically waives herein a spouse's elective share, homestead allowance, exempt allowance, family allowance, augmented estate, and all testate and intestate rights.

Eldon died in August 2013. His will, executed approximately 8 years before his marriage to Sharlene, did not leave anything to her. The inventory of Eldon's estate contained approximately $10 million in assets, the bulk of which related to the real property he owned.

In November 2015, Sharlene filed an application to be treated as an omitted spouse under Neb. Rev. Stat. § 30-2320 (Reissue 2016). That statute provides that if a testator fails to provide by will for a surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he or she would have received if the decedent had left no will.[2] The statute also provides that the rights of the omitted spouse can be "waived pursuant to section 30-2316."[3] Neb. Rev. Stat. § 30-2316 (Reissue 2016) allows a surviving spouse to waive the right of election "by a written contract, agreement, or waiver signed by the surviving spouse" either before or after the marriage.

Eldon's estate resisted Sharlene's application, arguing she waived her rights to Eldon's estate in the prenuptial agreement. After holding an evidentiary hearing at which Sharlene testified and the prenuptial agreement was admitted into evidence, the county court found the prenuptial agreement was valid under § 30-2316. It held that Sharlene had waived the right to take as an omitted spouse, and denied her application for share of an omitted spouse. Sharlene filed this timely appeal, which we moved to our docket.[4]

## ASSIGNMENTS OF ERROR

Sharlene assigns, restated and consolidated, that the trial court erred in (1) finding she was aware of the value of Eldon's real property, when it was not valued in the prenuptial agreement; (2) finding she should have known the value of Eldon's estate when the prenuptial did not list his personal property or contain his tax returns; and (3) finding the prenuptial agreement was enforceable when it failed to meet several statutory requirements on its face.

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[2] *Id.*

[3] § 30-2320(a).

[4] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

## STANDARD OF REVIEW

[1] An appellate court reviews probate cases for error appearing on the record made in the county court.[5]

[2] When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.[6]

## ANALYSIS

### Statutory Background

The probate court concluded the prenuptial agreement was an enforceable waiver of Sharlene's statutory right to receive a share of Eldon's estate as an omitted spouse. Sharlene argues the waiver was unenforceable under § 30-2316(b) for a variety of reasons. We begin our analysis with a review of the governing statute.

[3] Section 30-2316 applies when determining whether a surviving spouse has waived rights to the property or estate of a decedent spouse by signing a written contract, agreement, or waiver. Under that statute:

> (b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:
>
> (1) he or she did not execute the waiver voluntarily;
>
> (2) the waiver was unconscionable when it was executed and, before execution of the waiver, he or she:
>
> (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;
>
> (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and
>
> (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

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[5] *In re Estate of Pluhacek*, 296 Neb. 528, 894 N.W.2d 325 (2017).

[6] *Id.*

A similar statute, Neb. Rev. Stat. § 42-1006 (Reissue 2016), governs the enforceability of premarital agreements generally, and most often is applied in proceedings for the dissolution of marriage.[7] Section 42-1006 provides in pertinent part:

> (1) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (a) That party did not execute the agreement voluntarily; or
>
> (b) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> (i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Because the language and purpose of the two statutes is similar, case law interpreting and applying § 42-1006(1) will generally be instructive when interpreting and applying § 30-2316. However, there is one notable difference between the two statutes: § 42-1006(1) contains the connector "or" between subsections (a) and (b), but § 30-2316(b) has no connector between subsections (1) and (2). Eldon's estate argues that this statutory difference is significant and impacts Sharlene's burden of proof in this case. We agree.

In *Mamot v. Mamot*,[8] we considered the Legislature's inclusion of the term "or" in § 42-1006(1)(a), and we held that

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[7] See, *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012); *Edwards v. Edwards*, 16 Neb. App. 297, 744 N.W.2d 243 (2008).

[8] *Mamot v. Mamot, supra* note 7.

those seeking to prove a premarital agreement is unenforceable have the burden of proving "*either* that [he or] she did not voluntarily execute the premarital agreement *or* that the premarital agreement was unconscionable when it was executed."[9]

The present case requires us to determine whether the absence of the term "or" between § 30-2316(b)(1) and (2) is significant as it regards the burden of proof. Restated, the question is whether a surviving spouse must satisfy *both* subsections (b)(1) and (b)(2) of § 30-2316 to prove that a waiver signed by the surviving spouse is unenforceable.

[4,5] We note that §§ 30-2316(b) and 42-1006(1) were enacted by the Legislature in the same bill.[10] In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.[11] The Legislature is also presumed to know the language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.[12]

We presume the Legislature, having enacted §§ 30-2316 and 42-1006 as part of the same bill, was fully cognizant of the language used, and easily could have included the term "or" in both statutes when setting forth the evidence required to prove an agreement is unenforceable. It instead included "or" between subsections (1)(a) and (b) in § 42-1006, but omitted any connector between subsections (b)(1) and (2) in § 30-2316.

[6] During oral argument, Sharlene urged this court to read the term "or" into § 30-2316(b)(1) and apply the same burden of proof under both statutes. But it is not within the province

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[9] *Id.* at 664-65, 813 N.W.2d at 446 (emphasis in original).

[10] See 1994 Neb. Laws, L.B. 202.

[11] *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[12] *Id.*

of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.[13]

[7] We decline the invitation to read into § 30-2316(b) language which the Legislature plainly omitted. We instead hold that under the plain language of § 30-2316(b), a surviving spouse must satisfy the requirements of *both* subsections (b)(1) and (b)(2) in order to prove a waiver signed by the surviving spouse is unenforceable. We next consider whether the probate court erred in finding Sharlene did not meet this burden of proof.

## Voluntariness of Execution

Under § 30-2316(b)(1), Sharlene had the burden to prove she "did not execute the waiver voluntarily." The probate court implicitly found she failed to meet this burden and concluded she "knowingly and voluntarily entered" into the waiver. Sharlene does not assign error to this finding, and her brief concedes that she "does not deny that she went to the office of the attorney and signed the Agreement voluntarily."[14] However, Sharlene's briefing urges us to adopt a definition of "voluntarily" which includes consideration of factors beyond the execution of the agreement.

We have never addressed what "voluntarily" means in the context of § 30-2316(b)(1). The statute does not define the term. Black's Law Dictionary defines "voluntarily" as "[i]ntentionally; without coercion."[15] In *Edwards v. Edwards*,[16] the Nebraska Court of Appeals considered the meaning of "voluntarily" in the context of a dissolution case where the wife

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[13] *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

[14] Brief for appellant at 13.

[15] Black's Law Dictionary 1806 (10th ed. 2014).

[16] *Edwards v. Edwards, supra* note 7.

challenged the enforceability of a premarital agreement under § 42-1006(1). That court found instructive a five-factor test developed by a California court under the Uniform Premarital Agreement Act. We considered the same five-factor test in *Mamot v. Mamot*,[17] observing that "[t]he California court identified the following factors that a court might consider":

> (1) "coercion that may arise from the proximity of execution of the agreement to the wedding, or from surprise in the presentation of the agreement";
>
> (2) "the presence of absence of independent counsel or of an opportunity to consult independent counsel";
>
> (3) "inequality of bargaining power—in some cases indicated by the relative age and sophistication of the parties";
>
> (4) "whether there was full disclosure of assets"; and
>
> (5) the parties' understanding of the "rights being waived under the agreement or at least their awareness of the intent of the agreement."[18]

Here, Sharlene concedes she "went to the office of the Attorney and signed the agreement voluntarily."[19] Her brief asserts, however, that "voluntariness" under § 30-2316(b) requires "more than intentionally affixing one's name to a document"[20] and instead involves an application of all five *Edwards*/*Mamot* factors. Essentially, she invites this court to apply the *Edwards*/*Mamot* analysis to cases governed by § 30-2316. We decline this invitation for two reasons.

First, we note the *Edwards*/*Mamot* factors examine not only the procedural aspects of executing the agreement, but also

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[17] *Mamot v. Mamot, supra* note 7.

[18] *Id.* at 665-66, 813 N.W.2d at 447, quoting *In re Marriage of Bonds*, 24 Cal. 4th 1, 5 P.3d 815, 99 Cal. Rptr. 2d 252 (2000) (superseded by statute as stated in *In re Marriage of Cadwell-Faso and Faso*, 191 Cal. App. 4th 945, 119 Cal. Rptr. 3d 818 (2011)).

[19] Brief for appellant at 13.

[20] *Id.*

the substantive terms of the agreement regarding the full disclosure of assets. In that respect, the *Edwards*/*Mamot* factors tend to combine the separate elements of proof required under § 30-2316(b)(1) and (2), and frustrate judicial determination of whether both statutory requirements have been proved.

More directly, Sharlene does not explain in her brief to this court how application of the *Edwards*/*Mamot* factors would show the probate court erred in finding that her waiver was voluntarily executed. She makes no attempt to explain how the evidence relates to the individual factors or suggest any error in the probate court's reasoning or analysis.

On the record before us, Sharlene has not established that the probate court erred in finding she executed the waiver voluntarily. Having failed to prove she did not execute the waiver voluntarily under § 30-2316(b)(1), she cannot meet her burden of proving the waiver was unenforceable. For this reason, we need not reach her arguments as to the unconscionability of the waiver under § 30-2316(b)(2), as an appellate court need not engage in an analysis not necessary to resolve the appeal.[21]

## CONCLUSION

Finding no error in the probate court's conclusion that Sharlene executed the waiver voluntarily, we affirm that court's decision denying her application to take as an omitted spouse.

Affirmed.

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[21] See *In re Conservatorship of Abbott*, 295 Neb. 510, 890 N.W.2d 469 (2017).

Nebraska Supreme Court
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# Eric Cano, appellee, v. Michael Walker, appellant, and Billy E. Claborn, Jr., appellee.

901 N.W.2d 251

Filed September 1, 2017. No. S-16-634.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Contracts.** Contract interpretation presents a question of law.
3. **Judgments: Appeal and Error.** Appellate courts independently review questions of law decided by a lower court.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), there are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
6. ____: ____. Numerous factors determine when an order affects a substantial right for purposes of appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue. It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial. Whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter.
7. **Jurisdiction: Time: Notice: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912 (Reissue 2016), to vest an appellate court with jurisdiction, a party must timely file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing.
8. **Debtors and Creditors: Releases.** The voluntary release of one joint debtor operates as a release of his or her codebtors.

9. **Promissory Notes: Releases.** The unconditional release of one of several makers of a joint and several promissory note, without the consent of the other makers thereof, operates as a release of all.
10. **Contracts: Releases.** Under the common-law rule as it has developed in Nebraska, the qualifiers that releases must be "voluntary" and "unconditional" require consideration of general principles of contract interpretation when determining whether the common-law rule is applicable. Generally, the question is whether the language of the release at issue is unqualified such that it amounts to a complete satisfaction of the debt, or whether the language of the release is qualified such that it operates as merely a partial satisfaction of the debt.
11. **Releases.** The general rule of law is that a promise to release does not take effect until the agreed promise is completed.
12. **Judgments: Debtors and Creditors: Releases.** A judgment creditor may make a valid and binding agreement, either at the time a judgment is entered or later, to release and satisfy the judgment on terms other than receiving full payment of its amount. If the agreement to release or satisfy is executory, there is no release of the judgment until it is performed. The corollary to this rule is that once the relevant promises are performed, the agreement to release becomes effective.
13. **Courts.** The doctrine of stare decisis forms the bedrock of Nebraska's common-law jurisprudence.
14. **Courts: Appeal and Error.** The doctrine of stare decisis does not require appellate courts to blindly perpetuate a prior interpretation of the law if it was clearly incorrect, but it is entitled to great weight and requires that the courts adhere to their previous decisions unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
15. **Courts: Public Policy: Appeal and Error.** The doctrine of stare decisis is grounded in the public policy that the law should be stable, fostering both equality and predictability of treatment. By requiring appellate courts to adhere to their previous decisions in most circumstances, the doctrine of stare decisis promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Reversed and remanded with directions.

Warren R. Whitted, Jr., and Keith A. Harvat, of Houghton, Bradford & Whitted, P.C., L.L.O., for appellant.

Larry R. Forman, of Hillman, Forman, Childers & McCormack for appellee Eric Cano.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

This is an appeal from an order denying a motion to discharge judgment filed by one of two judgment debtors who were co-obligors on a promissory note. The issues raised by the parties require us to consider the applicability, and continued viability, of the common-law rule in contracts that "'[t]he unconditional release of one of several makers of a joint and several promissory note, without the consent of the other makers thereof, operates as a release of all.'"[1] We conclude the rule represents settled law in Nebraska, and we find it should have been applied by the district court in this case. Accordingly, we reverse, and remand with directions to discharge the judgment.

## I. FACTS

Eric Cano filed suit against Michael Walker and Billy E. Claborn, Jr., in October 2012, alleging they had failed to pay amounts due on a promissory note executed in April 2007. Cano prayed for judgment against them "jointly and severally" in the amount of $299,500, plus interest and penalties. All parties agree the promissory note imposed joint and several liability on Walker and Claborn.

Cano moved for summary judgment in October 2013. The matter was heard on November 12. At the hearing, Cano represented that the amounts due on the note were $299,500 in principal, a late charge of $14,975, and interest of $72,958.20, for a total of $387,433.20. On November 20,

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[1] *Bankers Life Ins. Co. v. Ohrt*, 131 Neb. 858, 862, 270 N.W. 497, 500 (1936). See, *Coleman v. Beck*, 142 Neb. 13, 5 N.W.2d 104 (1942); *Lamb v. Gregory*, 12 Neb. 506, 11 N.W. 755 (1882); *3's Lounge v. Tierney*, 16 Neb. App. 64, 741 N.W.2d 687 (2007).

the court entered summary judgment in favor of Cano and against both Walker and Claborn for $387,433.20.

Cano did not tell the court at the summary judgment hearing that he and Claborn had entered into a "Stipulation" on November 11, 2013, without Walker's knowledge. According to the terms of the stipulation, Claborn agreed to entry of judgment against him for the full amount due on the note, and agreed to pay $40,000 immediately and an additional $127,000 by June 2, 2014. Claborn also agreed to provide a new furnace and an air-conditioning unit for Cano's residence in Omaha, Nebraska, on or before December 13, 2013. The parties later agreed this was worth approximately $10,000. In exchange for these payments and services, Cano agreed not to execute on the judgment against Claborn so long as he complied with the stipulation, and further agreed that "[u]pon satisfaction by Claborn with the terms [of the stipulation], Cano shall forthwith release Claborn completely from such judgment . . . ."

After the court entered judgment on the promissory note, Cano attempted to execute on the judgment against Walker in various ways, representing that Walker owed the full amount of the judgment. Walker actively avoided the execution attempts and was held in contempt of court at least once.

On July 17, 2014, Cano filed what he captioned a "Satisfaction" in the case, which stated in full: "COMES NOW the Plaintiff and shows the Court that the Defendant Billy E. Claborn, Jr. has fully satisfied the Judgment against him in the above-captioned case, provided that the Judgment entered herein against Defendant Michael Walker remains unsatisfied." After filing this satisfaction, Cano continued his attempts to collect the judgment from Walker, and Walker continued to evade collection efforts.

In November 2015, Cano attempted once again to collect the judgment against Walker by seeking an order in aid of execution from the court. Walker filed an objection, raising for the first time the argument that satisfaction of the

judgment against Claborn operated to satisfy the judgment against Walker as well.

During the hearing on Walker's objection to Cano's request for an order in aid of execution, the parties argued about the legal effect of the satisfaction Cano had filed. Cano argued the satisfaction operated only as against Claborn, because it stated the judgment "remain[ed] unsatisfied" as against Walker. Walker relied on Nebraska case law holding that "'[t]he unconditional release of one of several makers of a joint and several promissory note, without the consent of the other makers thereof, operates as a release of all.'"[2]

The court commented that based on the court record, it appeared the entire judgment had been paid. In response to this comment, Cano's counsel, for the first time, informed the court and Walker he had made a "deal" with Claborn to pay $167,000 "in exchange for a release." Upon learning of the agreement and release, the court informed Cano that the order in aid of execution would be denied and that further proceedings were necessary.

Thereafter, Walker filed a motion to discharge the judgment, premised on the common-law rule that the release of one joint obligor on a promissory note operates to release all. After holding an evidentiary hearing, the district court overruled Walker's motion for discharge, but exercised its inherent authority to reduce the amount of the judgment by $40,000—the amount the record showed Claborn had paid to Cano before the summary judgment was entered on the full amount of the promissory note.

Walker filed this timely appeal, and we moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

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[2] *Id*.

[3] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

## II. ASSIGNMENTS OF ERROR

Walker assigns, restated and consolidated, that the district court erred in (1) finding the stipulation between Cano and Claborn did not release both Walker and Claborn from the judgment; (2) finding the satisfaction filed in July 2014 did not satisfy the judgment entered against both Walker and Claborn; (3) determining it had the inherent power to change the amount of the judgment entered on November 20, 2013; and (4) failing to discharge the judgment against Walker.

## III. STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[4]

[2] Contract interpretation presents a question of law.[5]

[3] Appellate courts independently review questions of law decided by a lower court.[6]

## IV. ANALYSIS

### 1. Jurisdictional Arguments

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[7] Cano presents two jurisdictional challenges in his brief. He argues that Walker has not appealed from a final order under Neb. Rev. Stat. § 25-1902 (Reissue 2016), and he argues that the appeal was untimely filed under Neb. Rev. Stat. § 25-1931 (Reissue 2016). We address each argument in turn.

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[4] *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017).

[5] *Beveridge v. Savage*, 285 Neb. 991, 830 N.W.2d 482 (2013); *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[6] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[7] *In re Guardianship & Conservatorship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015); *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015).

(a) Finality Under § 25-1902

[5] Under § 25-1902, there are three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.[8] Walker filed this appeal from the district court's May 26, 2016, order overruling his motion to discharge the judgment. That order is properly characterized as one made on summary application after judgment is rendered, and we focus on whether that order affected a substantial right.[9]

[6] Numerous factors determine when an order affects a substantial right for purposes of appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue.[10] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[11] Whether the effect of an order is substantial depends on "'"'"'whether it affects with finality the rights of the parties in the subject matter.'"'"'"[12]

Cano argues that because the order denying discharge also resulted in the judgment against Walker being reduced by $40,000, it was actually beneficial to Walker and therefore did not affect a substantial right. This argument ignores the nature of the relief Walker was seeking—to be fully discharged from the judgment. To the extent the district court denied that relief in overruling Walker's motion for discharge, we find the order affected a substantial right and was a final, appealable order.

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[8] *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

[9] § 25-1902.

[10] *In re Interest of Noah B. et al., supra* note 8.

[11] *Id.*

[12] *Id.* at 774, 891 N.W.2d at 119.

(b) Timeliness of Appeal

[7] Cano presents two arguments that Walker's appeal was untimely. Both arguments misstate the record, and addressing them in detail is unnecessary. Under Neb. Rev. Stat. § 25-1912 (Reissue 2016), to vest an appellate court with jurisdiction, a party must timely file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing.[13] Here, Walker filed his notice of appeal within 30 days of the court's order overruling his motion to discharge the judgment. This appeal was timely filed, and Cano's arguments to the contrary are meritless.

2. Nebraska Common Law Regarding Release of Joint Debtors in Contract

[8,9] In the area of contracts, Nebraska has long followed the common-law rule that the "'voluntary release'" of one joint debtor operates as a release of his or her codebtors.[14] It is well settled that "'[t]he unconditional release of one of several makers of a joint and several promissory note, without the consent of the other makers thereof, operates as a release of all.'"[15]

The question presented in this appeal is whether, on the facts of this case, the common-law rule applies. The answer to that question turns on whether the stipulation between Cano and Claborn, and/or the subsequent satisfaction of judgment, represented an unconditional and voluntary release of Claborn. If so, then under the common-law rule, Walker was also released.

Over the years, this court has used the terms "voluntary" and "unconditional" when referencing the common-law rule

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[13] *Clarke, supra* note 6.

[14] *Coleman, supra* note 1, 142 Neb. at 17, 5 N.W.2d at 106. Accord *Lamb, supra* note 1.

[15] *Bankers Life Ins. Co., supra* note 1, 131 Neb. at 862, 270 N.W. at 500. See, *Farmers State Bank v. Baker*, 117 Neb. 29, 219 N.W. 580 (1928); *Huber Mfg. Co. v. Silvers*, 85 Neb. 760, 124 N.W. 148 (1910).

regarding releases of co-obligors,[16] but we have not defined those terms. Our use of these terms in describing the common-law rule appears to be unique; general sources citing the common-law rule do not contain the qualifiers "voluntary" or "unconditional."[17] Instead, the common-law rule is simply that a release of one joint obligor releases all.[18]

[10] We understand the qualifiers in our recitation of the common-law rule to require consideration of general principles of contract interpretation when determining whether the common-law rule is applicable. Generally, the question is whether the language of the release at issue is unqualified such that it amounts to a complete satisfaction of the debt, or whether the language of the release is qualified such that it operates as merely a partial satisfaction of the debt.[19] We review our prior decisions to illustrate the application of the common-law rule as it has developed in Nebraska.

We first applied the common-law rule in 1882, in *Lamb v. Gregory*.[20] There, the plaintiff obtained a deficiency judgment against two debtors. One of the debtors moved to have the judgment set aside as to him because it was discharged in bankruptcy. The plaintiff agreed "'to the setting aside of the judgment'" against that debtor, and it was set aside.[21] Later, the other debtor moved to be discharged from the judgment, arguing the release of the first debtor operated as a release of both from liability on the judgment. We agreed, citing the rule that "'[i]f two or more are jointly bound, or jointly and

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[16] See, *Coleman, supra* note 1; *Bankers Life Ins. Co., supra* note 1; *Lamb, supra* note 1.

[17] See, generally, Annot., 53 A.L.R. 1420 (1928).

[18] *Id.* See, also, *Schiffer v. United Grocers, Inc.*, 329 Or. 86, 989 P.2d 10 (1999).

[19] See *Bankers Life Ins. Co., supra* note 1. See, generally, 53 A.L.R., *supra* note 17 (noting that courts will look at parties' intentions when construing release and that express reservation of rights can avoid common-law rule).

[20] *Lamb, supra* note 1.

[21] *Id.* at 507, 11 N.W. at 755.

severally bound, and the obligee releases one of them, all are discharged.'"[22]

In *Huber Mfg. Co. v. Silvers*,[23] the plaintiff sued on five promissory notes, signed jointly by three debtors. The notes were given by the debtors for the purchase from the plaintiff of a steam thresher separator. After the notes were executed, one of the three debtors, John Silvers, went to the plaintiff and represented that he had sold his interest in the threshing outfit to the others and that they had assumed and agreed to pay the notes. The plaintiff, without investigating the veracity of this claim, agreed to release Silvers from the notes and sell him another threshing machine. The terms of the release were that Silvers was "'"released without recourse"'" from the notes.[24] Noting the record was unclear as to Silvers' veracity, we applied the common-law rule to hold, with "great reluctance," that the release of Silvers operated as a release of all debtors on the notes.[25]

In *Farmers State Bank v. Baker*,[26] four parties were jointly liable on promissory notes. Through a complicated arrangement, one of the parties was released from liability on the notes. Although that release did not appear to contemplate or intend any release of the others, we nevertheless held that the release of one of several makers of a joint and several promissory note, without the consent of the others, operated as a release of all.

In *Bankers Life Ins. Co. v. Ohrt*,[27] the holder sued five makers of a note and mortgage. At the beginning of the trial, the holder stated that he "'waive[d] personal liability of the

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[22] *Id.* at 508, 11 N.W. at 755.

[23] *Huber Mfg. Co., supra* note 15.

[24] *Id.* at 761, 124 N.W. at 148.

[25] *Id.* at 765, 124 N.W. at 149.

[26] *Farmers State Bank, supra* note 15.

[27] *Bankers Life Ins. Co., supra* note 1.

defendant Rosa Oft'" on the note and mortgage.[28] Later, counsel withdrew that waiver on the record. On appeal, the other four makers argued this was an unconditional release of Rosa Oft and operated as a release of all of them as well. We disagreed, and found the release did not apply to all. We reasoned the evidence did not show the release was unconditional, because the statement was not that Oft was "released from all effects of the note and mortgage," but merely that the plaintiff had waived Oft's "personal liability."[29] We also found it significant that the waiver had been withdrawn.

In *Coleman v. Beck*,[30] a husband and wife executed a promissory note and a mortgage. They later sold the real property encumbered by the mortgage to Lyle Trumbley, who assumed payment of the mortgage. The real estate was foreclosed upon, and a deficiency judgment was entered against the husband, the wife, and Trumbley. The bank then released the husband and wife from the judgment, and Trumbley argued on appeal that the release operated to release him as well. We held the common-law rule did not apply, because Trumbley, who had assumed the promissory notes, was not a joint debtor on the notes with the husband and wife. Rather, he was the surety on the mortgage debt, and we concluded that a release of the husband and wife did not affect his liability.

With these holdings in mind, we consider the relevant documents in the present case.

### 3. Release Documents

#### (a) Stipulation

The stipulation between Cano and Claborn provided in relevant part:

> Notwithstanding entry of the judgment against Claborn as aforesaid, Cano covenants that he shall take no steps to

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[28] *Id.* at 862, 270 N.W. at 500.

[29] *Id.*

[30] *Coleman, supra* note 1.

> execute on such judgment and that he shall take no action against Claborn with respect to said judgment so long as Claborn complies with the terms of this Stipulation. Upon satisfaction by Claborn with the terms hereof, Cano shall forthwith release Claborn completely from such judgment and from any liability for any amounts in excess of the amounts required from Claborn as set forth herein.

[11] The plain language of this stipulation provided that Cano would not take any action on the judgment against Claborn while Claborn's promise to pay the agreed amounts remained executory, but that once Claborn's promise was completed, Claborn would be released "completely." This interpretation is consistent with the general rule of law that a promise to release does not take effect until the agreed promise is completed.[31]

We find the plain and unambiguous language of this stipulation operated as an unconditional and voluntary release of Claborn as soon as he satisfied its terms. Our record does not reveal the precise date on which Claborn satisfied the terms of the stipulation, but there is no dispute that he did so, prompting Cano to file the satisfaction of judgment which we consider next.

(b) Satisfaction

The satisfaction Cano filed in this case recited that Claborn had "satisfied the Judgment against him" and further recited that "the Judgment entered herein against . . . Walker remains unsatisfied." Cano argues that the qualifying language of the satisfaction reserved Walker's liability and prevented the unconditional release of Claborn from operating as a release of Walker.

[12] But we conclude the relevant and operative release language is found in the stipulation, not the satisfaction. A

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[31] 50 C.J.S. *Judgments* § 892 (2009).

judgment creditor may make a valid and binding agreement, either at the time a judgment is entered or later, to release and satisfy the judgment on terms other than receiving full payment of its amount.[32] If the agreement to release or satisfy is executory, there is no release of the judgment until it is performed.[33] The corollary to this rule is that once the relevant promises are performed, the agreement to release becomes effective.[34] So, once the terms of the stipulation were met in this case, Claborn was fully and unconditionally released. The qualifying language recited later in the satisfaction of judgment was irrelevant.

### 4. Releases of Joint Tort-feasors Are Governed by Different Rules

In his briefing on appeal, Cano relies rather extensively on Nebraska law addressing joint liability in tort and the effect of releasing one of several joint tort-feasors. Because Nebraska statutes and case law treat joint tort-feasors differently than co-obligors on a contract or judgment, the rules governing release of joint tort-feasors are not instructive in the present case.

### 5. Continued Viability of Common-Law Rule

Cano urges this court to abolish the common-law rule that the unconditional release of one of several co-obligors on a note, without the consent of the others, operates as a release of all. Nebraska is among a minority of jurisdictions to continue applying the common-law rule. Of those jurisdictions that have abolished the rule, most have done so through legislative action rather than judicial decision.[35]

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[32] *Id.*

[33] *Id.*

[34] See *id.*

[35] See, e.g., *Schiffer, supra* note 18 (including appendix listing how each state treats issue).

[13-15] The doctrine of stare decisis forms the bedrock of our common-law jurisprudence.[36] While it does not require us to blindly perpetuate a prior interpretation of the law if we conclude it was clearly incorrect,[37] it is entitled to great weight[38] and requires that we adhere to our previous decisions "unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so."[39] The doctrine "is grounded in the public policy that the law should be stable, fostering both equality and predictability of treatment."[40] By requiring appellate courts to adhere to their previous decisions in most circumstances, the doctrine of stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[41]

The common-law rule in contracts—that an unconditional release of one joint obligor without the consent of the others operates to release all—has governed business decisions and contractual arrangements in Nebraska for more than a century. The rule is predictable, easy to understand, and easy to apply. Moreover, at least as it has developed in Nebraska, the common-law rule includes the unique requirements that a release of one joint debtor must be both "voluntary" and "unconditional" before the rule operates to release all joint debtors. So if individuals and businesses want to structure releases in a way that avoids the consequences of the rule, it is clear how to do so.

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[36] *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004).

[37] *Id.*

[38] *Edwards v. Hy-Vee*, 294 Neb. 237, 883 N.W.2d 40 (2016).

[39] *Id.* at 247, 883 N.W.2d at 47-48.

[40] *State v. Hausmann*, 277 Neb. 819, 828, 765 N.W.2d 219, 226 (2009).

[41] *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S. Ct. 2024, 2036, 188 L. Ed. 2d 1071 (2014) (citations omitted).

We see no principled reason to depart from this settled precedent, and we decline Cano's invitation to abolish the common-law rule in Nebraska. If the settled common law is to be amended or abolished, that action should be undertaken by the Legislature rather than the judiciary.

## V. CONCLUSION

Under settled Nebraska contract law, the unconditional release of one of several joint obligors on a promissory note, without the consent of the other obligors, operates as a release of all. Walker and Claborn were co-obligors on a promissory note that was reduced to a judgment. Without the consent of Walker, Cano and Claborn entered into a stipulation which operated as an unconditional release of Claborn once he satisfied the terms of the stipulation.

As such, under the common-law rule in Nebraska, the unconditional release of Claborn from the judgment operated as a release of Walker. Because the district court erred in denying Walker's motion to discharge the judgment against him, we reverse, and remand with directions to grant the requested discharge.

Reversed and remanded with directions.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Kelly Armstrong, appellee, v. Clarkson College, appellant.

901 N.W.2d 1

Filed September 1, 2017. No. S-16-717.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Contracts: Appeal and Error.** The formation and terms of an implied contract are questions of fact, which an appellate court reviews for clear error.
5. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
6. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
7. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
8. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case which

are presented by the pleadings and which are supported by competent evidence.

9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
10. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
11. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
12. ____: ____. It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
13. ____: ____. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
14. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.
15. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
16. **Contracts: Parties: Intent.** An implied in fact contract arises where the intention of the parties is not expressed in writing but where the circumstances are such as to show a mutual intent to contract.
17. **Contracts: Parties.** The requisite mutuality for an enforceable contract is absent when one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.
18. **Contracts: Intent.** Where an implied in fact contract exists, its terms may be shown by the surrounding facts and circumstances giving rise to the contract, the conduct of the parties when performing under the contract, or a general reasonableness standard.
19. ____: ____. As a general matter, the terms of an implied contract are a question of fact to be determined by the jury based on the evidence presented.
20. **Pleadings.** An affirmative defense raises a new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.

21. **Colleges and Universities: Breach of Contract.** An argument that academic deference applies to a decision of a college or university is not an affirmative defense, but instead relates to the proper standard for reviewing a plaintiff's claim for breach of contract premised on an academic judgment.
22. **Colleges and Universities: Courts.** Not every decision by an academic institution is subject to deference.
23. **Directed Verdict: Pleadings.** If there are controverted facts to support recovery upon any theory of liability pled by the plaintiff, then a directed verdict is properly denied.
24. **Contracts.** The doctrine of impossibility of performance, often now called impracticability of performance, excuses a promisor's failure to perform a duty under a contract where performance has been rendered severely impracticable or impossible by unforeseen circumstances.
25. **Contracts: Proof.** There are three general requirements for the application of the doctrine of impracticability of performance: (1) the occurrence (or nonoccurrence) of the event causing the impracticability was unexpected; (2) performance of the duty by the promisor would be extremely difficult and burdensome, if not impossible; and (3) the promisor did not assume the risk of the event's occurrence (or nonoccurrence).
26. **Contracts.** Performance of a contractual duty is not impracticable merely because it has become inconvenient or more expensive. Mere difficulty of performance is not enough.
27. ____. A promisor's duty to perform will be excused if it is the other party's conduct that makes performance impossible or impracticable.
28. **Contracts: Proof.** The party invoking the impracticability defense must show that he or she used reasonable efforts to surmount the obstacles which prevented performance.
29. **Jury Instructions: Evidence.** A tendered jury instruction is warranted by the evidence only if there is enough evidence on the issue to produce a genuine issue of material fact for the jury to decide.
30. **Damages.** A party is required only to mitigate damages that might have been avoided by reasonable efforts.
31. ____. In reviewing the reasonableness of a party's actions to mitigate damages, an appellate court often considers three factors: (1) the cost or difficulty to the plaintiff of mitigation, (2) the plaintiff's financial ability to mitigate, and (3) the defendant's actions to inhibit the plaintiff from mitigating damages.
32. **Administrative Law: Appeal and Error.** Under the doctrine of exhaustion of administrative remedies, one must generally exhaust any available administrative remedies before one can seek judicial review.

33. **Administrative Law.** The exhaustion of administrative remedies doctrine generally applies to governmental entities.
34. **Administrative Law: Appeal and Error.** The exhaustion of remedies doctrine applies in many cases to private, nongovernmental entities that provide internal administrative review procedures.
35. **Colleges and Universities: Employment Contracts.** Where an employer or university provides a mandatory grievance procedure in a contract, the enforceability of a party's rights under the contract is conditioned on the exercise of that grievance procedure.
36. **Contracts: Appeal and Error.** Mandatory grievance procedures must be exhausted before seeking judicial review, because the grievance procedure is part of the contractual bargain and defines the rights themselves.
37. **Administrative Law: Contracts: Proof.** The exhaustion of a mandatory grievance procedure in a contract is a condition precedent to enforcing the rights under that contract.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Reversed and remanded for a new trial.

Brien M. Welch and Kathryn J. Cheatle, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Jason Mario Bruno and Robert S. Sherrets, of Sherrets, Bruno & Vogt, L.L.C., for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Wright, J.

## I. NATURE OF CASE

A jury awarded Kelly Armstrong a $1 million verdict on her breach of contract claim against Clarkson College (Clarkson). Armstrong had been a student at Clarkson, but was placed on probation and then administratively withdrawn from the school by Clarkson. Clarkson appeals the district court's denial of its motion for a directed verdict, the denial of several requested jury instructions, the exclusion of evidence, and the denial of its motion for new trial. Because we conclude that the district court erred by refusing to give Clarkson's requested jury instruction on Armstrong's alleged failure to fulfill a condition

precedent by not exhausting the college's grievance procedure, we reverse, and remand for a new trial.

## II. BACKGROUND

### 1. Clarkson's CRNA Program

Clarkson is a nonprofit health science college located in Omaha, Nebraska. In 2010, Clarkson established a program for a master of science in nursing with a specialization in nurse anesthesia (CRNA program). After a student graduates from the program, the student can take a national examination to become a certified registered nurse anesthetist (CRNA).

The CRNA program, like other nurse anesthetist programs, has two components, didactic and clinical. Clarkson's program is "front-loaded," with the completion of the didactic portion first, followed by the clinical portion. The didactic portion, consisting of coursework, lasts 12 months. The clinical portion is completed at various clinical sites and lasts 18 months. In the clinical stage of the CRNA program, the students work at a hospital under the supervision of the hospital's CRNA staff, gaining experience in nearly every type of case a CRNA would encounter in practice. Clarkson contracts with clinical sites to provide clinical education for its students. These contracts, known as clinical affiliation agreements, outline the obligations of both Clarkson and the clinical sites.

When the events underlying this litigation occurred in 2013, Clarkson had five primary clinical sites. A primary clinical site is one where a student completes the vast majority of his or her clinical work. In 2013, Clarkson also had two rural specialty sites where a student in the CRNA program could gain experience in a rural hospital setting. These specialty sites are designed to supplement the student's clinical experience, but unlike the primary clinical sites, do not provide all of the types of experience a student needs to complete his or her clinical requirements.

In the fall of 2011, Armstrong enrolled in the CRNA program. She completed the didactic portion, earning a 3.84 grade point average. Armstrong then began the clinical phase of

the program and was assigned to the University of Nebraska Medical Center (UNMC) as her main clinical site. She then began doing a rotation at a specialty clinical site in Red Oak, Iowa.

### 2. Program Handbooks and Manuals

At trial, several of Clarkson's student handbooks and policy manuals were admitted into evidence, including: Clarkson's student handbook, the handbook for nurse anesthesia students, Clarkson's nurse anesthesia program policies and procedures manual, Clarkson's nurse anesthesia program clinical site manual, and Clarkson's grievance policy. Clarkson's Code of Conduct (Code of Conduct) is contained within its student handbook, which applies to all students, not just those in the CRNA program.

Many of the Clarkson handbooks and policies contained disclaimers that they were not contractual in nature: the CRNA program handbook states, "The information in this syllabus is intended to be informational and not contractual in nature," and the CRNA program policies and procedures manual states, "The statements contained herein are not to be regarded as an offer or contract." Clarkson's student handbook and its clinical site manual do not appear to contain contractual disclaimers. Most of the handbooks also contained clauses reserving Clarkson's right to change the policies at any time.

Also admitted was the code of ethics for the CRNA, which is adopted and promulgated by the American Association of Nurse Anesthetists (AANA). Clarkson students in the CRNA program are required to follow this code of ethics (AANA Code of Ethics) under the CRNA program handbook.

### 3. AANA Conference

When Armstrong was approximately halfway done with the clinical portion of the CRNA program, she decided to attend a national AANA conference in Washington, D.C. Armstrong testified at trial that she and Kristal Hodges, who Armstrong described as her "best friend in the program at the time,"

decided to go, because they thought the conference would be fun and would provide a break from the rigors of clinical work. The conference took place on April 14 to 17, 2013. Armstrong and Hodges were the only two students in the Clarkson CRNA program who attended this national conference.

### 4. AANA Political Action Committee Potomac Cruise Fundraiser

The AANA conference was 4 days long, Sunday through Wednesday. The conference on Sunday featured discussions on the legislative and political issues facing the nurse anesthetist profession. Hodges arrived on Saturday, the day before the conference, while Armstrong arrived on Sunday afternoon. The two stayed in the same hotel room.

On Sunday night, AANA's political action committee hosted a fundraiser event for the conference attendees. The fundraiser was a boat cruise on the Potomac River. The attendees were instructed to wear either professional attire or dress for the event's 1980's theme. Many members of the Nebraska Association of Nurse Anesthetists and Nebraska CRNA's were in attendance at the fundraiser.

Conference attendees were provided bus transportation to the fundraiser boat ride. Alcohol was served at the fundraiser; the attendees were given two drink tickets, and glasses of champagne were offered to them as they arrived on the boat.

Armstrong testified that she consumed only four alcoholic drinks on the cruise. She testified that she used her two drink tickets for two beers, but did not remember finishing her champagne. She said that Timothy Glidden, the chief CRNA at UNMC and Armstrong's clinical supervisor, bought her a beer as did another individual. Armstrong estimated that the fundraiser lasted about 4 hours.

### 5. Bus Ride

After the fundraiser ended, the attendees were transported by bus back to the hotel. The bus was filled with conference and fundraiser attendees, including many from Nebraska. Also

on the bus was Nancy Gondringer, the federal political director and past president of the Nebraska Association of Nurse Anesthetists and a member of the "Small States Committee" of the AANA. Glidden was on the bus, as was another UNMC CRNA and also a Clarkson CRNA instructor. Dennis Bless, the then-incoming president of the AANA, was also on the bus. Other students in CRNA programs and CRNA's from Nebraska and other states rode on the bus as well.

There was some conflict in the witnesses' testimony at trial about what happened on the bus ride. Armstrong testified that she got on the bus and took a seat near Bless. She said that she and Bless were joking about the 1980's costumes that some were wearing as part of the fundraiser's theme. Hodges was seated behind her. Armstrong said that she asked for the fake moustache that Bless had as part of his 1980's costume and then stood up and turned around to Hodges, placed the moustache on her stomach, just below her belly button, and made a joke about a term used to reference ungroomed pubic hair. Armstrong said that she had used the term in the past as a nickname for Hodges or to tease her and that it was an "inside joke" between the two about Hodges' being single, because "if you're going to go out and start dating, you better clean that up." Armstrong testified that she told Bless that ungroomed pubic hair could have been part of her 1980's-themed costume, after which she obtained his fake moustache to make her joke.

Other witnesses, such as Hodges, Gondringer, and Glidden, gave a slightly different account. They testified that Armstrong held her pants down near her pubic symphysis, with the moustache just above her pants, walking up and down the aisle of the bus, saying things like, "Look at my [ungroomed pubic hair]," and "[t]his is how yours looks like" to Hodges. Hodges, Gondringer, and Glidden told Armstrong to stop several times, after which she eventually sat down. But Armstrong testified that the other witnesses' accounts of her behavior were "exaggerated quite a bit."

6. Probation

(a) Return From Conference

As Armstrong was en route home from the conference, Hodges called Armstrong because she was concerned that Armstrong had missed her flight because she did not wake up in time that morning. According to Hodges, when they spoke over the telephone, Armstrong told Hodges that Hodges did not know how to have fun and was "too uptight." They argued about what had happened at the conference. Hodges told Armstrong that Armstrong may be in some trouble with Clarkson, because "[t]here were so many people there" and "[s]omebody's going to say something."

Dr. Mary Hoversten, the director of Clarkson's CRNA program, soon received word of the incident on the fundraiser bus ride. The day the conference ended, about 3 days after the incident, Hoversten received a telephone call from Hodges, informing her about the incident. Hodges was emotional on the call and told Hoversten that Armstrong's behavior was unprofessional and very embarrassing to her. The next morning, Hoversten informed her supervisor of the situation and they decided to meet with Armstrong when she returned. Hoversten spoke to Armstrong over the telephone and told her not to return to her specialty clinical site, but to return to Clarkson's campus for a meeting. According to Hoversten, Armstrong acknowledged during the call that her behavior was unprofessional and that she was sorry about it.

Hoversten spoke with Glidden over the telephone. Glidden described what he had observed on the bus ride and that he thought Armstrong's behavior was unprofessional and inappropriate. He said that he was not sure whether Armstrong would be allowed back at UNMC, her main clinical site. Hoversten also called Gondringer about the incident on the bus ride.

(b) April 23, 2013, Meeting

On April 23, less than a week after the conference ended, Armstrong had a meeting at Clarkson. In attendance at the meeting were Armstrong; Hoversten; Dr. Tony Damewood, the

vice president of operations for Clarkson; and the vice president of academic affairs. Armstrong brought an attorney to the April 23 meeting. According to Armstrong, her attorney was not allowed in the meeting by Damewood, who made him wait in the hallway.

The decision was made to place Armstrong on probation for violating the AANA Code of Ethics and the CRNA program handbook. Armstrong was told at the meeting that she would not be able to return to her specialty clinical site due to the rule in the CRNA program handbook that students on clinical probation cannot work at specialty clinical sites. According to Hoversten's notes from the meeting, the possibility that her clinical site may not allow her to return due to the incident was discussed.

Damewood, who was not a part of the CRNA program, was present at the April 23 meeting because of his role in Clarkson's student assistance program. Damewood told Armstrong at the meeting that she had violated the Clarkson Code of Conduct. The Code of Conduct is a part of the Clarkson student handbook, applicable to all Clarkson students, not just the students in the CRNA program. The Code of Conduct has different procedural requirements for student discipline than the procedures for placing a student on clinical probation under the CRNA program handbook. Damewood said at trial that, in retrospect, he did not believe that Armstrong violated the Code of Conduct. Damewood never told Armstrong that he was incorrect to state that her conduct violated the Code of Conduct. No charges were ever filed against Armstrong under the Code of Conduct.

(c) April 24, 2013, Meeting

The next day, April 24, the academic progression committee met to formally notify Armstrong that she was being placed on probation and discuss the probation terms. Present at the meeting were Armstrong, Hoversten, and Dr. Ann Glow, the assistant director of the CRNA program. The notes from the meeting state that another faculty member and two

UNMC clinical coordinators were absent and would be briefed on the meeting.

At the April 24 meeting, Armstrong was given a formal notice by Hoversten that she was being placed on probation. The general plan for probation was discussed. The tentative plan was for Armstrong to return to her primary clinical site, UNMC, pending the approval of Glidden. Armstrong was told of UNMC's right to terminate her clinical experience. The plan, if UNMC did not allow her to return, was that Clarkson would "make a reasonable attempt to place [Armstrong] in an alternative site. . . . If this is unsuccessful, [Armstrong] will be given the option to withdraw from the program or be terminated. [Armstrong] is made aware of [Clarkson's] Student Grievance Policy . . . ."

Hoversten told Armstrong that she was being placed on probation due to a violation of rule 3.4 of the AANA Code of Ethics, which states that "[t]he CRNA is responsible and accountable for his or her conduct in maintaining the dignity and integrity of the profession." Armstrong was given a copy of this portion of the AANA Code of Ethics.

Also discussed at the meeting was the CRNA program handbook rule regarding practice and professional ethics. The rule regarding professionalism states that "[s]tudents shall conduct themselves in a professional and respectable manner during class time, clinical time and during professional meetings and seminars." The subpart of the professionalism rule related to practice and professional ethics incorporates the AANA Code of Ethics and makes it applicable to students in the Clarkson CRNA program:

> The program expects students to adopt and observe the AANA Code of Ethics. Violations of this ethical conduct standard will be regarded as professional and academic misconduct and failure to meet clinical performance objectives, and be subject to review as such.
>
> If a student is found to be noncompliant with this policy disciplinary actions will be taken, up to and/or including dismissal from the Program.

Additionally, the CRNA program handbook's probation policy and dismissal procedure was discussed. That provision distinguishes between academic probation and clinical probation. A student must, at a minimum, be placed on clinical probation for certain reasons, including "[f]ailure to comply with the AANA ethical code of conduct." It also states that a student may be dismissed from the program for failing to comply with the AANA Code of Ethics. Armstrong was also given a copy of this portion of the CRNA program handbook.

The program's withdrawal and grievance policies were also discussed with Armstrong. The grievance policy allows students to grieve a complaint that "a specific decision or action that affects the student's academic record or status has violated published policies and procedures, or has been applied to the grievant in a manner different from that used for other students." The policy details the procedure for filing a grievance, including that grievances must be filed no later than 7 days after the incident in question. Grievances are heard by a grievance committee, which is composed of five members: an academic council member, a faculty member from the faculty senate executive committee, a student representative, a director from student services, and the vice president of academic affairs (who votes only in case of a tie vote), each of which must be without conflicts of interest. The policy states that "[t]he Grievance Committee is the designated arbiter of disputes within the student community in cases, which do not involve a violation of the Student Code of Conduct . . ." and that "[d]ecisions made by the Grievance Committee and/or [vice president of academic affairs] shall be final." Armstrong was provided a copy of the grievance procedure and a grievance form.

Armstrong was given a copy of the withdrawal policy in the CRNA program handbook by Hoversten so that if she were unable to progress in the program, she could withdraw from the program and reapply at another program without having a dismissal on her academic record. Armstrong was also provided a copy of the CRNA program handbook policy

on time off during the program, which states that during the clinical phase, students are allowed only 25 days of planned or unplanned absences.

Armstrong agreed to the terms of the probation. She testified that she felt like she had no choice but to agree to the probation "because there was no other option. I felt like the other option would be you're done, like, you can't go on any further, so there was really no choice."

(d) April 25, 2013, Meeting

Another meeting was held on April 25 with Armstrong, Hoversten, and Glow. Hoversten learned earlier that day that Glidden and UNMC's CRNA education committee had unanimously decided not to allow Armstrong back at UNMC. Glidden said at trial that he had a patient safety concern based on what he observed of Armstrong's behavior on the Washington, D.C., trip. Hoversten told Armstrong that she would try to find her another clinical site. Hoversten and Glow told Armstrong that they were her advocates.

Hoversten sent emails to the CRNA program's other primary clinical sites to see if they would be willing to take Armstrong. These emails were substantially similar and read:

> I have a situation with a student. She has recently been put on probation due to misconduct. Her primary clinical site has made the decision not to allow her to return as a [CRNA program student]. Her problems are behavioral not academic. This is not a patient safety issue.
>
> As her program director, I am making every effort to reassign her to another site. If you feel you have enough room for a second senior Clarkson student and your group would be willing to take this on, please call me at your earliest convenience. If not, let me know so I can move forward with this search.

Hoversten also spoke to some of the clinical site representatives over the telephone. After receiving Hoversten's communications, all of the clinical sites declined to take Armstrong. Hoversten said that she felt obligated to be honest with the

clinical sites that Armstrong was on probation, but also wanted to let them know that Armstrong posed no risk to patient safety and did not have any academic problems.

Hoversten testified that she could not have opened a new clinical site to accommodate Armstrong, as Armstrong requested, because the process of approving a new site would take 6 months to a year. Hoversten also could not have allowed Armstrong to return to her specialty clinical rotation temporarily, because under the clinical probation policy in the CRNA program handbook, students may not be on a specialty clinical rotation while on clinical probation. Hoversten testified that she could not extend the program and put her in a clinical site because that would take up a clinical spot reserved for someone in the class behind her.

### 7. Administrative Withdrawal

After all of Clarkson's clinical sites refused to take Armstrong, she was without a clinical site. Under the CRNA program handbook, students are allowed a total of 25 absences during their clinical phase. Soon, Armstrong had run out of allowed absences. Hoversten told her that she needed to withdraw from the CRNA program, as was the plan under the probation terms if another clinical site could not be found. Armstrong was not willing to withdraw.

On May 9, Hoversten spoke with the Clarkson registrar about withdrawing Armstrong from the program. Rather than dismissing Armstrong, Hoversten administratively withdrew her from the program. Hoversten was told by the registrar that Armstrong's academic record would show that she withdrew, but would not show whether it was a student dismissal or an administrative dismissal. Hoversten testified that by administratively withdrawing Armstrong rather than dismissing her, she was trying to help her in case she wanted to apply to another program.

### 8. Lawsuit and Trial

Armstrong sued Clarkson for breach of contract. Before trial, the district court granted Armstrong's motion in limine

to exclude any reference at trial to a prior incident of alleged plagiarism involving Armstrong. For purposes of the motion, the court admitted an "Academic Honesty Conference Form." According to the form, Armstrong's "senior project [was] a continuation of a previous student's project. [Armstrong] submitted the first section of her paper in which the majority was identical to the former student's paper, including the entire literature review." Under the student comments, it states, "It was my thought that by taking over another student's project I was continuing where it left off. I now understand this was wrong . . . ." She was allowed to start her coursework over with a new assignment schedule. Armstrong stated in her deposition that she did not commit plagiarism and that the incident was a misunderstanding.

At the jury instruction conference, Clarkson requested a jury instruction on failure to fulfill a condition precedent, which the district court denied. Clarkson claimed that Armstrong failed to fulfill a condition precedent by failing to take advantage of Clarkson's grievance procedure before filing a lawsuit.

Clarkson also requested a jury instruction on impossibility of performance, which the district court denied. Clarkson argued that the actions of Armstrong and the clinical sites made it impossible to perform its obligation to provide a clinical site for Armstrong.

The district court allowed Clarkson to amend its pleading to conform to the evidence on the issue of mitigation of damages. But the district court denied Clarkson's requested jury instruction on mitigation of damages. Clarkson argued that Armstrong could have mitigated her damages by reapplying to Clarkson or other CRNA programs.

The jury returned a verdict for Armstrong in the amount of $1 million.

After trial, Clarkson moved to set aside the verdict or, in the alternative, moved for a new trial. The motion was based on the district court's failure to grant Clarkson's motion for directed verdict at the close of Armstrong's case in chief and

at the close of her rebuttal, the district court's failure to give Clarkson's requested jury instructions, and other grounds. The district court denied the motion.

Clarkson then brought this appeal. We granted Clarkson's petition to bypass the Nebraska Court of Appeals.

## III. ASSIGNMENTS OF ERROR

Clarkson assigns several errors. They are, restated, that the district court (1) erred in not granting its motion for directed verdict, because there was no evidence that it acted arbitrarily and capriciously; (2) abused its discretion in excluding evidence of Armstrong's plagiarism; (3) erred by not instructing the jury on Armstrong's alleged failure to fulfill a condition precedent by not exhausting the school's internal grievance procedure; (4) erred by not instructing the jury on the affirmative defense of "impossibility of performance"; (5) erred by not instructing the jury on Armstrong's alleged failure to mitigate her damages; and (6) erred in not granting Clarkson's motion to set aside the verdict or for a new trial for the above errors.

## IV. STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.[1] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[2]

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[1] *Winder v. Union Pacific RR. Co.*, 296 Neb. 557, 894 N.W.2d 343 (2017).

[2] *Id.*

[3,4] An appellate court independently reviews questions of law decided by a lower court.[3] The formation and terms of an implied contract are questions of fact, which an appellate court reviews for clear error.[4]

[5-7] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[5] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[6] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.[7]

[8-13] A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.[8] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[9] Whether the jury instructions given by a trial court are correct is a question of law.[10]

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[3] *Donut Holdings v. Risberg*, 294 Neb. 861, 885 N.W.2d 670 (2016).

[4] See, *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011); *K.M.H. v. Lutheran Gen. Hosp.*, 230 Neb. 269, 431 N.W.2d 606 (1988).

[5] *Pierce v. Landmark Mgmt. Group*, 293 Neb. 890, 880 N.W.2d 885 (2016).

[6] *Id.*

[7] *Id.*

[8] *RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326, 886 N.W.2d 240 (2016).

[9] *Id.*

[10] *Anderson v. Union Pacific RR. Co.*, 295 Neb. 785, 890 N.W.2d 791 (2017).

When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[11] However, it is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.[12] If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.[13]

[14,15] An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.[14] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[15]

## V. ANALYSIS

### 1. Denial of Clarkson's Motion for Directed Verdict

We first address Clarkson's assertion that the district court erred in not granting its motion for directed verdict. The parties do not dispute that there was a contractual relationship between them, but Clarkson asserts that its actions were subject to academic deference such that no breach occurs unless its actions are arbitrary and capricious. It argues it was entitled to judgment as a matter of law because there was no evidence it acted arbitrarily and capriciously in its actions leading to Armstrong's damages.

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[11] *Id.*

[12] *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015).

[13] *Id.*

[14] *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016).

[15] *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 885 N.W.2d 675 (2016).

[16] A contract may be express, implied, written, or oral.[16] An implied in fact contract arises where the intention of the parties is not expressed in writing but where the circumstances are such as to show a mutual intent to contract.[17] We conclude that the relevant terms of the contract between Clarkson and Armstrong are implied.

[17] It is clear that the Clarkson student handbooks do not express in writing the relevant terms of the contract between Clarkson and Armstrong. Where an employee handbook expressly states that it creates no contractual obligations, we have refused to treat it as creating any such obligations.[18] Moreover, the requisite mutuality for an enforceable contract is absent when one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.[19]

Clarkson's CRNA program handbook, which Clarkson concluded Armstrong violated and under which she was placed on probation, states that "[t]he statements contained herein are not to be regarded as an offer or contract." It further states that "[t]he information in this syllabus is intended to be informational and not contractual in nature" and that Clarkson "reserves the right to amend, alter, change, or modify the provisions of this syllabus at any time and in any manner . . . ." Similar language is found in many of Clarkson's other handbooks. Because these student handbooks both expressly state they create no contractual obligations and they reserve to

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[16] *Fast Ball Sports v. Metropolitan Entertainment*, 21 Neb. App. 1, 835 N.W.2d 782 (2013).

[17] *Donut Holdings v. Risberg, supra* note 3.

[18] See *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 512 N.W.2d 358 (1994).

[19] See, *id.*; *Millien v. Colby College*, 874 A.2d 397 (Me. 2005) (holding in similar case that while contractual relationship existed between student and university, student handbook was not enforceable contract because of its reservation clause that allowed university power to unilaterally alter its terms).

Clarkson the power to alter the provisions of the handbooks at any time and in any manner, the relevant terms of the contract between Clarkson and Armstrong are implied.

[18,19] Where an implied in fact contract exists, its terms may be shown by the surrounding facts and circumstances giving rise to the contract, the conduct of the parties when performing under the contract, or a general reasonableness standard.[20] And, as a general matter, the terms of an implied contract are a question of fact to be determined by the jury based on the evidence presented.[21]

Clarkson argues that all its actions relevant to Armstrong's claimed damages constituted academic judgments that are entitled to deference. Academic deference is given to the expert evaluation of cumulative information involved in academic decisionmaking.[22]

For several reasons, Armstrong asserts that the academic deference standard does not apply in this case. Alternatively, Armstrong argues that the deferential standard for academic judgments constitutes an affirmative defense that was waived and that there was evidence from which the jury could have concluded that Clarkson's actions were arbitrary and capricious.

[20,21] We find no merit to Armstrong's claim that the deferential standard was an affirmative defense. An affirmative defense raises a new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.[23] Clarkson's argument about

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[20] See, *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014); *City of Scottsbluff v. Waste Connections of Neb., supra* note 4; *K.M.H. v. Lutheran Gen. Hosp., supra* note 4.

[21] See, *City of Scottsbluff v. Waste Connections of Neb., supra* note 4; *K.M.H. v. Lutheran Gen. Hosp., supra* note 4.

[22] See, *Doe v. Board of Regents*, 287 Neb. 990, 846 N.W.2d 126 (2014); *Doe v. Board of Regents*, 283 Neb. 303, 809 N.W.2d 263 (2012); *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[23] *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 885 N.W.2d 1 (2016).

the deferential standard applicable to academic judgments does not raise a new matter, but instead relates to the proper standard for reviewing a plaintiff's claim for breach of contract premised on an academic judgment.[24]

We also reject Armstrong's assertion that academic deference applies only to state-run universities and only to due process rather than contract claims. In *Doe v. Board of Regents*,[25] we held that a university's academic judgments are entitled to substantial deference in a breach of contract claim contesting the medical school's academic evaluation of the plaintiff's professionalism while performing his residency, and its ultimate decision of dismissal. Virtually all authorities hold that deference is due the academic judgments of colleges and universities in contract claims, regardless of whether the institution is private or public.[26]

[22,23] But it does not follow that every decision by an academic institution is subject to deference. The parties' arguments on appeal illustrate that although courts extend academic

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[24] See cases cited *supra* note 22.

[25] *Doe v. Board of Regents, supra* note 22, 283 Neb. 303, 809 N.W.2d 263 (2012).

[26] See *Chang v. Purdue University*, 985 N.E.2d 35, 47 (Ind. App. 2013) (holding in breach of contract claim against university arising from dismissal of student for unprofessional behavior that "[o]ur sole function when reviewing disciplinary actions such as in the present case is to determine whether the educational institution acted illegally, arbitrarily, capriciously, or in bad faith"). See, also, *Mangla v. Brown University*, 135 F.3d 80 (1st Cir. 1998); *Doe v. Brown University*, 209 F. Supp. 3d 460 (D.R.I. 2016); *Holert v. Univ. of Chicago*, 751 F. Supp. 1294 (N.D. Ill. 1990); *Seitz-Partridge v. Loyola University*, 409 Ill. App. 3d 76, 948 N.E.2d 219, 350 Ill. Dec. 150 (2011); *Abdullah v. State*, 771 N.W.2d 246 (N.D. 2009); *Kashmiri v. Regents of University of Cal.*, 156 Cal. App. 4th 809, 67 Cal. Rptr. 3d 635 (2007); *Raethz v. Aurora University*, 346 Ill. App. 3d 728, 805 N.E.2d 696, 282 Ill. Dec. 77 (2004); *Harwood v. Johns Hopkins*, 130 Md. App. 476, 747 A.2d 205 (2000); *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 404 N.E.2d 1302 (1980); *Lexington Theological Seminary v. Vance*, 596 S.W.2d 11 (Ky. App. 1979). See, generally, Annot., 47 A.L.R.5th 1 (1997).

deference to some disciplinary judgments involving specialized academic or professional expertise, when such expertise comes into play is often less than clear.[27] Regardless of whether the deferential standard applies to Clarkson's other decisions, we find that academic deference does not apply to its failure to provide Armstrong with a clinical site. And if there are controverted facts to support recovery upon any theory of liability pled by Armstrong, then the directed verdict was properly denied.[28]

One of the theories presented by Armstrong in her complaint, and on which the jury was instructed, was that Clarkson breached its contract with Armstrong by failing to provide her with a clinical site or the necessary clinical training to complete the CRNA program. Armstrong testified that prior to enrolling at Clarkson, Hoversten told her that Clarkson had affiliation agreements with different clinical sites and told her that she would be able to obtain the clinical hours she needed to graduate. Hoversten testified at trial that Clarkson was obligated to provide Armstrong with a clinical site as part of the program.

We conclude that Clarkson did not "actually exercise professional judgment"[29] when it failed to provide Armstrong with a clinical site. Clarkson does not argue that it prevented

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[27] See, generally, 47 A.L.R.5th, *supra* note 26.

[28] See, *MacDonald Engineering Company v. Hover*, 290 F.2d 301 (8th Cir. 1961); *Byrd v. Delasancha*, 195 S.W.3d 834 (Tex. App. 2006); *Gill Const., Inc. v. 18th & Vine Authority*, 157 S.W.3d 699 (Mo. App. 2004); *Springer v. Haugeberg, Rueter, Stone & Gowell*, 124 Or. App. 2, 860 P.2d 912 (1993); *Atkins v. City Finance Co.*, 683 S.W.2d 331 (Tenn. App. 1984); *Campbell v. Brinson*, 89 Ariz. 197, 360 P.2d 211 (1961).

[29] See *Raethz v. Aurora University, supra* note 26, 346 Ill. App. 3d at 732, 805 N.E.2d at 699, 282 Ill. Dec. at 80 ("a court may not override the academic decision of a university 'unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment,'" quoting *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985)).

Armstrong from obtaining a clinical site for some academic reason or as punishment for her misconduct. Quite the opposite, Clarkson argues in another assignment of error that its ability to provide a clinical site was rendered impossible by the clinical sites' decisions not to take Armstrong. That is, Clarkson argues that Armstrong's inability to obtain a clinical site was not Clarkson's decision, but the decision of the clinical sites. Clarkson is certainly not entitled to deference for a decision that it claims it did not make.

Clarkson and Armstrong disagree about Clarkson's contractual duty to provide a clinical site. The disagreement is whether the duty was a one-time duty that Clarkson performed when it initially provided Armstrong with her clinical site at UNMC or was an ongoing duty throughout the duration of Armstrong's time in the program, such that Clarkson had a duty to find her a different clinical site once UNMC refused to allow her to return when she was placed on probation.

The terms of that duty were a question for the jury. The jury could have reasonably concluded that Clarkson's duty was ongoing and that it breached its duty when it failed to provide her a clinical site after she was placed on probation and UNMC refused to allow her to return there.

Additionally, the jury could have concluded that Clarkson failed to take reasonable steps to find Armstrong another clinical site in accord with the terms of her probation. At trial, Armstrong testified that she agreed to the terms of her probation, and the jury could have reasonably found that these terms modified the contract between Clarkson and Armstrong. Broadly speaking, the terms were: Armstrong would return to her primary clinical site, UNMC, if allowed back by UNMC; Clarkson would "make a reasonable attempt" to place her at another clinical site if UNMC did not allow her back; and if no site were found, she would either withdraw or be dismissed from the program. The notes from the initial meeting state that if UNMC would not allow Armstrong to return, "Hoversten would do everything she can to retain a clinical site within reason."

The jury could have concluded that Clarkson failed to make a reasonable attempt or failed to do everything it could within reason to find Armstrong another site. While Clarkson made some attempts to obtain a site for Armstrong after UNMC refused to allow her back—sending an email to its other clinical sites and making some telephone calls—whether these efforts were reasonable was a question for the jury. The jury could have reasonably concluded that Clarkson's efforts were not reasonable.

We need not decide in this appeal whether Clarkson's determination of the nature and type of professionalism that is required of nurse anesthetists and its CRNA program students, and its determination that Armstrong should be placed on probation, is the type of academic judgment to which courts should defer. Neither do we need to determine whether reasonable minds could have differed as to whether Clarkson acted arbitrarily and capriciously in determining that Armstrong acted unprofessionally and that her actions warranted probation. The district court did not err in denying Clarkson's motion for directed verdict, because the jury could have rendered a verdict for Armstrong based on Clarkson's failure to provide her with a clinical site, an action that under the facts of this case was entitled to no deference.

### 2. Exclusion of Clarkson's Evidence of Armstrong's Alleged Plagiarism

Clarkson argues that the district court erred by granting Armstrong's motion in limine to exclude evidence of Armstrong's alleged plagiarism. It argues that the plagiarism was a part of the res gestae of its decision to place Armstrong on probation, which led to her administrative withdrawal. Armstrong argues that this evidence was properly excluded because it is not relevant and would be unfairly prejudicial. We conclude that the district court did not abuse its discretion in excluding evidence of the alleged plagiarism.

In a pretrial deposition, Hoversten said that Armstrong's inability to progress in the program was "the only reason why

she was withdrawn." But at trial, Clarkson made an offer of proof that if allowed to testify, "Hoversten would be able to explain the issues concerning plagiarism and the reason why that entered in to her ultimate decisions with respect to [Armstrong]."

One of the reasons for the exclusion of the plagiarism evidence advanced by Armstrong in her pretrial motion in limine and on appeal is that it would violate Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016). Under rule 403, evidence, even if relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[30]

Here, there is no question that allegations of plagiarism would carry a risk of unfair prejudice. The allegation could significantly affect the jury's evaluation of Armstrong's credibility. And the evidence presented at trial affirmatively shows that the alleged plagiarism, which Armstrong contends was a misunderstanding, played a minimal role, if any, in Clarkson's decision to discipline Armstrong. Moreover, Hoversten testified in her pretrial deposition that Armstrong's inability to progress in the program was the only reason for her dismissal, in contradiction to the offer of proof made at trial. The evidence of the alleged plagiarism carried little or no probative value and a significant risk of unfair prejudice. Under these circumstances, we conclude that the district court did not abuse its discretion in excluding evidence of Armstrong's alleged plagiarism.

### 3. Denial of Clarkson's Requested Jury Instructions

Clarkson assigns error to the district court's refusal to give three of its proposed jury instructions. Clarkson tendered jury instructions on the impossibility of Clarkson's performance,

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[30] See, generally, *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017).

Armstrong's alleged failure to mitigate her damages, and Armstrong's alleged failure to fulfill a condition precedent.

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[31]

(a) Impossibility of Performance

Clarkson argues that the district court erred in not giving its proffered jury instruction on impossibility of performance. Clarkson argues that Armstrong's conduct and the clinical site's refusal to accept her made it impossible for Clarkson to perform its duties under the contract. Armstrong argues that Clarkson's performance was not impossible, because it should not have disciplined her in the first place, and that it could have demanded that UNMC allow her back, done a better job advocating for her to other clinical sites, or allowed her to stay at her specialty clinical site temporarily. We conclude that the district court did not err by failing to give Clarkson's jury instruction on impossibility of performance.

[24,25] The doctrine of impossibility of performance, often now called impracticability of performance, excuses a promisor's failure to perform a duty under a contract where performance has been rendered severely impracticable or impossible by unforeseen circumstances.[32] The Restatement (Second) on Contracts, § 261, entitled "Discharge by Supervening Impracticability," states:

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[31] *RM Campbell Indus. v. Midwest Renewable Energy, supra* note 8.

[32] See, *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129, 825 N.W.2d 767 (2013); *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 376 N.W.2d 312 (1985); *Mohrlang v. Draper*, 219 Neb. 630, 365 N.W.2d 443 (1985). See, generally, 14 James P. Nehf, Corbin on Contracts § 74 (Joseph M. Perillo ed., rev. ed. 2001); 30 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 77 (4th ed. 2004).

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[33]

There are three general requirements for the application of the doctrine of impracticability of performance: (1) the occurrence (or nonoccurrence) of the event causing the impracticability was unexpected; (2) performance of the duty by the promisor would be extremely difficult and burdensome, if not impossible; and (3) the promisor did not assume the risk of the event's occurrence (or nonoccurrence).[34]

[26] Performance of a contractual duty is not impracticable merely because it has become inconvenient or more expensive.[35] Mere difficulty of performance is not enough.[36] As the Supreme Court of Colorado explained regarding the distinction between impossibility and mere difficulty:

> "'[T]he true distinction is not between difficulty and impossibility. A man may contract to do what is impossible . . . . The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor.' . . ."[37]

[27,28] A promisor's duty to perform will be excused if it is the other party's conduct that makes performance impossible

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[33] Restatement (Second) of Contracts § 261 at 313 (1981) (cited by *Cleasby v. Leo A. Daly Co., supra* note 32).

[34] 14 Nehf, *supra* note 32, § 74.1 (Corbin on Contracts).

[35] See *Mohrlang v. Draper, supra* note 32.

[36] See *id.*

[37] *Littleton v. Emp. Fire Ins. Co.*, 169 Colo. 104, 108, 453 P.2d 810, 812 (1969).

or impracticable.[38] And the party invoking the impracticability defense must show that he or she used reasonable efforts to surmount the obstacles which prevented performance.[39]

[29] Here, Clarkson's tendered jury instruction is a correct statement of law. It is based on NJI2d Civ. 15.20, entitled "Impossibility of Performance." But Clarkson's jury instruction was not warranted by the evidence. A tendered jury instruction is warranted by the evidence only if there is enough evidence on the issue to produce a genuine issue of material fact for the jury to decide.[40] Clarkson's instruction was not warranted, because the difficulty was not unexpected and Clarkson failed to take reasonable steps to overcome the difficulty.

For the defense of impracticability of performance to apply, the event making performance impracticable must be unexpected. Here, it was not unexpected that a student might be placed on probation or that a clinical site might dismiss or refuse to accept a student. While the specific details of Armstrong's behavior might have been unexpected, it certainly was not unforeseen to Clarkson that a student might act in an unprofessional manner. Nor was it unforeseen that a student might be placed on probation. This is precisely why Clarkson

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[38] See, *Hardin v. The Eska Co., Inc.*, 256 Iowa 371, 377-78, 127 N.W.2d 595, 598 (1964) ("the rule is well settled that one party to a contract may not hamper the efforts of the other in performance according to its terms. . . . 'Each party to a contract impliedly agrees not to prevent . . . the other party from performing or, . . . to render performance impossible by any act of his own'"); 14 Nehf, *supra* note 32, § 74.3 (Corbin on Contracts). Cf. *D & S Realty v. Markel Ins. Co*., 284 Neb. 1, 816 N.W.2d 1 (2012) (discussing the doctrine of prevention); *Fast Ball Sports v. Metropolitan Entertainment, supra* note 16 (same).

[39] *McCalden v. California Library Ass'n*, 955 F.2d 1214 (9th Cir. 1990) (superseded by rule on other grounds as stated in *Harmston v. City and County of San Francisco*, 627 F.3d 1273 (9th Cir. 2010)); 30 Lord, *supra* note 32, § 77:8 (Williston on Contracts).

[40] See, generally, *Tapp v. Blackmore Ranch*, 254 Neb. 40, 56, 575 N.W.2d 341, 352 (1998) ("[a] litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence").

has rules regarding professionalism and student probation. It is also clear that it was not unforeseen to Clarkson that a clinical site might terminate or refuse to accept a student; its clinical affiliation agreement with UNMC expressly contemplates this. The agreement provides the conditions under which UNMC could terminate a student's clinical experience and provides that Clarkson would not reassign a terminated student to UNMC without approval, but that approval "will not be unreasonably withheld." Clarkson's policies and its clinical affiliation agreement unambiguously show that Armstrong's probation and the clinical sites' refusal to accept her were not unexpected. Thus, the doctrine of impracticability of performance cannot apply.

The doctrine of impracticability also does not apply because Clarkson failed to use reasonable efforts to overcome the difficulty it faced in performing its duty to provide Armstrong with a clinical site. Clarkson failed to make any attempts to enforce its rights under its clinical affiliation agreement with UNMC or any other sites in order to secure a clinical site for Armstrong. The clinical affiliation agreement gives UNMC "the right to terminate a student's clinical experience" in situations where "flagrant or repeated violations of [UNMC's] rules, regulations, policies, or procedures occur." It also allows UNMC "to take immediate action when necessary to preserve the quality of patient services and to maintain operation of its facilities free from interruption." No evidence was presented at trial that Armstrong violated any rules at UNMC, much less that she engaged in flagrant or repeated violations. Nor was any evidence presented that she posed any risk to the quality of patient services or was a risk of causing interruption at UNMC. And Hoversten stated in her emails to the other clinical sites that Armstrong was not a patient safety risk. Clarkson did not make any efforts to demand that UNMC perform its obligations under the agreement and allow Armstrong to return to complete her clinical studies.

As the party invoking the impracticability defense, Clarkson must show that it used reasonable efforts to overcome the

obstacles which prevented its performance—here, the clinical sites' refusals to accept Armstrong. Because Clarkson failed to make any efforts to enforce its rights under the clinical agreement with UNMC or with the other clinical sites, it is not entitled to a defense of impracticability based on their decisions to not accept Armstrong. We conclude that the district court did not err in refusing to give Clarkson's tendered jury instruction on impossibility of performance.

(b) Mitigation of Damages

Clarkson argues that the district court erred in refusing to give its proffered jury instruction on mitigation of damages. It claims that Armstrong failed to mitigate her damages by failing to reapply for Clarkson's CRNA program or apply at a nurse anesthetist program at another school. Armstrong argues that it would have been futile to reapply at Clarkson after it withdrew her from the program and that she could not afford to attend a nurse anesthetist program at another school. We conclude that the district court did not err in refusing Clarkson's requested jury instruction on mitigation of damages.

There is no question that Clarkson's tendered instruction is a correct statement of law.[41] It is nearly identical to NJI2d Civ. 4.70, the model jury instruction on mitigation of damages.

But Clarkson's proffered jury instruction was not warranted by the evidence. A tendered jury instruction is warranted by the evidence only if there is enough evidence on the issue to produce a genuine issue of material fact for the jury to decide.[42]

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[41] See *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 95, 710 N.W.2d 71, 80 (2006) ("[t]he general rule is that whenever applicable, the Nebraska Jury Instructions are to be used [and the i]nstruction given by the district court is taken nearly verbatim from NJI2d Civ. 4.70 and is a correct statement of the law" (citations omitted)).

[42] See, generally, *Tapp v. Blackmore Ranch, supra* note 40; *Tedd Bish Farm v. Southwest Fencing Servs.*, 291 Neb. 527, 867 N.W.2d 265 (2015) (discussing jury instruction on mitigation of damages at summary judgment stage).

> [30,31] Regarding the mitigation of damages, we have said: Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury. . . . A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts.[43]

A party is required only to mitigate damages that might have been avoided by "reasonable efforts."[44] A plaintiff is "'not required to unreasonably exert himself or to incur an unreasonable expense in order to'" mitigate damages.[45] In reviewing the reasonableness of a party's actions to mitigate damages, we often consider three factors: (1) the cost or difficulty to the plaintiff of mitigation, (2) the plaintiff's financial ability to mitigate, and (3) the defendant's actions to inhibit the plaintiff from mitigating damages.[46]

The first two factors are dispositive here. The only evidence presented at trial about Armstrong's ability to complete her degree at another program was her testimony that, according to Hoversten and one or two other program directors with whom she spoke, nurse anesthesia credits are nontransferable, meaning that she would have to start her 30-month program

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[43] *Borley Storage & Transfer Co. v. Whitted, supra* note 41, 271 Neb. at 95, 710 N.W.2d at 80.

[44] See *id.*

[45] *Hidalgo Prop., Inc. v. Wachovia Mortg. Co.*, 617 F.2d 196, 200 (10th Cir. 1980). See, also, *System Components Corp. v. Florida DOT*, 14 So. 3d 967 (Fla. 2009); *Coughlin Const. v. Nu-Tec Indus., Inc.*, 755 N.W.2d 867 (N.D. 2008); *Chicago Title Ins. Co. v. HNB*, 87 Ohio St. 3d 270, 719 N.E.2d 955 (1999); *Great American Ins. v. N. Austin Utility*, 908 S.W.2d 415 (Tex. 1995).

[46] See *Tedd Bish Farm v. Southwest Fencing Servs., supra* note 42.

over from the beginning. According to Armstrong, Hoversten told Armstrong that she could reapply at Clarkson, but would have to start the program over. Clarkson has the only CRNA program in Omaha. There is only one other program in the state; according to Armstrong, Glidden—who decided not to allow her to return to UNMC—is on the board at that other program. And Armstrong also testified that she could not afford to reapply and start a CRNA program over.

Thus, according to the evidence presented at trial, in order to mitigate her lost future income damages, Armstrong would have had to start a 30-month program over; pay for that program, which she could not afford; and likely move out of state. A plaintiff is not required to make unreasonable efforts or incur unreasonable expense in mitigating damages. And ordinarily, a plaintiff is not required to make expenditures to mitigate that are beyond his or her financial means or to relocate to another city or state.[47] We conclude, as a matter of law, that Armstrong did not fail to mitigate her damages by not reapplying and enrolling at Clarkson or at another CRNA program. Clarkson's mitigation jury instruction was not warranted by the evidence, and thus, the district court did not err in refusing to give that instruction.

(c) Failure to Fulfill Condition Precedent

Clarkson argues that the district court erred in refusing to give its proffered jury instruction on failure to fulfill a

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[47] See, *Hegler v. Board of Ed. of Bearden Sch. Dist., Bearden, Ark.*, 447 F.2d 1078, 1081 (8th Cir. 1971) (holding that teacher's failure to apply for out-of-state teaching jobs was not failure to mitigate, because "it was not unreasonable for her to refuse to abandon her community and move to another state in order to reduce damages caused by the School Board's unlawful acts"); *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists*, 14 Cal. App. 3d 209, 219, 92 Cal. Rptr. 111, 117 (1971) ("[o]rdinarily a duty to mitigate does not require an injured party to take measures which are unreasonable or impractical or which require expenditures disproportionate to the loss sought to be avoided or which are beyond his financial means").

condition precedent. It argues that exhausting its internal grievance procedure is a condition precedent to the enforceability of Armstrong's rights under the contract. We conclude that the district court erred in denying Clarkson's tendered jury instruction on Armstrong's alleged failure to fulfill a condition precedent by not exhausting Clarkson's grievance procedure.

While the district court should have instructed the jury on the condition precedent issue, Armstrong's failure to exhaust the grievance procedure would be irrelevant if she never agreed to the policy. To prevail on this defense, Clarkson must prove to a jury that the grievance policy was a term of the contract. As discussed above, the student handbooks that contain contractual disclaimers or reserve an unrestricted power to amend the policies contained therein are not contracts and do not supply the terms of the agreement between Clarkson and Armstrong. We are not deciding that the grievance policy was a term of the contract, but only that a jury should have been instructed on the issue. On remand, the jury will determine whether the grievance policy was a term of the contract and whether Armstrong's failure to grieve is excused by any of the exceptions to the exhaustion of remedies requirement.

*(i) Clarkson's Instruction Was Correct Statement of Law*

[32,33] Armstrong argues that Clarkson's instruction was not a correct statement of law, because the doctrine of exhaustion of remedies does not apply to private, nongovernmental entities like Clarkson. This argument is without merit. Under the doctrine of exhaustion of administrative remedies, one must generally exhaust any available administrative remedies before one can seek judicial review.[48] The exhaustion requirement

[48] See *Vaccaro v. City of Omaha*, 6 Neb. App. 410, 573 N.W.2d 798 (1998), *affirmed* 254 Neb. 800, 579 N.W.2d 535.

has been considered a jurisdictional prerequisite in some cases and a condition precedent to filing suit in others.[49] This doctrine generally applies to governmental entities.[50]

[34] But the exhaustion of remedies doctrine also applies in many cases to private, nongovernmental entities that provide internal administrative review procedures. Courts have required plaintiffs to exhaust their remedies with private entities before seeking judicial review in cases involving mandatory grievance procedures in employee handbooks,[51] university grievance procedures for reviewing faculty tenure decisions,[52] union grievances against employers,[53] and intercollegiate athletic association appeals,[54] just to name a few. And this court has refused to grant equitable relief against a private association if the plaintiff-member has not first exhausted his or her remedies within the association.[55] We have also held that "an individual stockholder must exhaust all means of redress

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[49] See *Vaccaro v. City of Omaha, supra* note 48, 254 Neb. 800, 579 N.W.2d 535 (1998).

[50] See, generally, *Vaccaro v. City of Omaha, supra* note 48, 6 Neb. App. 410, 573 N.W.2d 798 (1998).

[51] *McGuire v. Continental Airlines, Inc.*, 210 F.3d 1141 (10th Cir. 2000) (interpreting Colorado law).

[52] *Neiman v. Yale University*, 270 Conn. 244, 851 A.2d 1165 (2004).

[53] *Republic Steel v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965).

[54] *State Board of Ed. v. National Collegiate Ath. Ass'n*, 273 So. 2d 912 (La. App. 1973). See, also, *Oliver v. Natl. Collegiate Athletic Assn.*, 155 Ohio Misc. 2d 1, 920 N.E.2d 190 (2008).

[55] *Crisler v. Crum*, 115 Neb. 375, 213 N.W. 366 (1927). See, also, *FHSAA v. Melbourne Central Catholic School*, 867 So. 2d 1281, 1287-88 (Fla. App. 2004) ("[g]enerally, the exhaustion doctrine applies not only to state agencies, but also to voluntary associations. . . . Under the common law, associations may require their members to exhaust all internal remedies within the association before resorting to any court or tribunal outside of the association. As a general rule, when a private organization has procedures for internal review of its decisions, those procedures must be exhausted before seeking redress from a court" (citations omitted)).

within the corporation before bringing" a stockholder derivative suit.[56] In sum, the requirement of exhausting internal remedies with a private entity as a prerequisite to bringing suit is common throughout the law. Armstrong's argument that the exhaustion requirement does not apply to Clarkson's grievance procedure because it is not a governmental entity is unpersuasive.

Three cases on the exhaustion of remedies doctrine are instructive here. In *McGuire v. Continental Airlines, Inc.*,[57] the 10th Circuit Court of Appeals, interpreting Colorado law, addressed a breach of contract claim (among other claims) by an employee against his private employer, Continental Airlines (Continental). At trial, the jury found for the plaintiff on the breach of contract claim. The plaintiff, whose employment had been terminated for violation of the company absence policy, alleged that his supervisor had miscalculated the number of his absences. In Continental's employee handbook, it provided a four-step internal appeal process to contest employee discipline. The appeal procedure stated, "'If a matter involving the proper application of Company policy or disciplinary action (including dismissal) is not resolved to the employee's satisfaction [after discussing the matter with the employee's immediate supervisor], the employee may file a formal appeal using Continental's Appeal Procedure.'"[58] The plaintiff did not initiate the final two stages of the appeal procedure.

The court began with the legal proposition that "[o]rdinarily, an employee must seek to exhaust an employer's exclusive internal grievance process before seeking judicial relief."[59] It then concluded that "Continental's grievance procedure

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[56] *Kowalski v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 615, 71 N.W.2d 147, 151 (1955).

[57] *McGuire v. Continental Airlines, Inc., supra*, note 51.

[58] *Id.* at 1143-44.

[59] *Id.* at 1146.

was the exclusive remedy for challenging a breach of the Attendance Policy."[60] It reached this conclusion by reasoning that while the policy was expressed in permissive language ("'the employee *may* file a formal appeal'"[61]), under Colorado law, "[a]ny doubt as to the application of the [grievance] procedure is to be resolved in favor of exclusivity."[62] The court held that the plaintiff's breach of contract claim failed because he had failed to exhaust his remedies, and it reversed the jury's verdict.

Another instructive case from the Supreme Court of Connecticut is *Neiman v. Yale University*,[63] which Clarkson cites at length in its brief. In that case, a professor sued Yale University, a private school, for breach of contract arising from its failure to offer her a tenured faculty position. The university faculty handbook contained a grievance procedure, which stated that if a faculty member believed that a university policy had not been followed or insufficient consideration was given for a faculty reappointment or promotion decision, "'the faculty member *may* request review of his or her complaint.'"[64] The plaintiff did not file a grievance. The trial court dismissed the plaintiff's claim because of her failure to exhaust the grievance procedure.

The court held that the exhaustion requirement applied, stating, "We agree with the majority of jurisdictions that the exhaustion of remedies doctrine applies to the internal grievance processes provided by academic institutions."[65] It reasoned that "[t]o allow a plaintiff to sidestep these procedures would undermine the internal grievance procedure that the parties had agreed to and encourage other litigants to

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[60] *Id.*

[61] *Id.* at 1143 (emphasis supplied).

[62] *Id.* at 1146.

[63] *Neiman v. Yale University, supra* note 52.

[64] *Id.* at 257, 851 A.2d at 1173 (emphasis in original).

[65] *Id.* at 255, 851 A.2d at 1172.

ignore the available process as well."[66] It also reasoned that with respect to tenure decisions, "academic institutions themselves are best suited to be the original forum for these types of disputes."[67]

The court also concluded that the grievance procedure, in spite of being phrased in permissive language ("'the faculty member *may* request review of his or her complaint'"), was mandatory.[68] The court said that the permissive language of the policy meant that "although the plaintiff was not compelled to pursue administrative remedies, the language meant that the plaintiff had the choice of either forgoing the grievance procedure and accepting the decision or using the procedure available."[69] The court affirmed the trial court's dismissal.

Another relevant case from the Court of Appeals of New Mexico is *Lucero v. UNM Bd. of Regents*.[70] The plaintiff, who worked at the University of New Mexico Health Sciences Center, sued his former employer. He brought a breach of contract claim (not a due process claim) based on the termination of his employment, which he argued violated the employee handbook. The handbook's grievance procedure stated that if an employee could not resolve an issue with his or her immediate supervisor, the employee "'may submit a grievance in writing to the immediate supervisor or Administrator.'"[71] The plaintiff did not file a grievance. The trial court held a bench trial and entered judgment in favor of the plaintiff.

The court reversed the trial court's judgment because the plaintiff had failed to file a grievance. It stated that "an employee must exhaust grievance procedures in an employee

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[66] *Id.*

[67] *Id.*

[68] *Id.* at 257, 851 A.2d at 1173 (emphasis in original).

[69] *Id.* at 257-58, 851 A.2d at 1173.

[70] *Lucero v. UNM Bd. of Regents*, 2012 NMCA 055, 278 P.3d 1043 (2012).

[71] *Id.* at ¶ 2, 278 P.3d at 1044.

handbook or manual before filing claims against the employer for breach of contract."[72] The court noted that "[c]ourts from other jurisdictions have uniformly applied the same rule, regardless of whether the employer is a public entity or a private entity."[73]

[35] What these cases illustrate is that where an employer or university provides a mandatory grievance procedure in a contract, the enforceability of a party's rights under the contract is conditioned on the exercise of that grievance procedure. Several rationales underlie the requirement of exhaustion of remedies in these and other similar cases. These rationales are not limited to the employment context, but apply with equal force to the internal procedures of colleges and universities.

First, the exhaustion requirement is important because it allows the private entity—whether an employer, labor union, private association, or university—"to redress wrongs without burdening the courts with unnecessary litigation."[74] Courts need not and should not be in the business of addressing internal issues within a private organization before the decisionmaking process has had the opportunity to run its course and become final. Here, Clarkson's grievance committee, composed of outside individuals in the college without any conflicts of interest, may well have decided that Armstrong should not have been disciplined, that she should have been given more time to complete the program, and that she should not have been administratively withdrawn, or could have made some other decision favorable to her. By allowing Clarkson's decisionmaking process to run its full course, the need for judicial intervention may well have been obviated. Not only does the exhaustion requirement give the school the opportunity to correct its own potential mistakes through its grievance procedure, but it conserves valuable and scarce

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[72] *Id.* at ¶ 10, 278 P.3d at 1045.

[73] *Id.* at ¶ 12, 278 P.3d at 1046.

[74] *Id*. at ¶ 13, 278 P.3d at 1046.

judicial resources by preventing unnecessary litigation in some cases.

Related to the policy of conservation of judicial resources, the exhaustion requirement serves to build a record if later judicial proceedings do ensue and to clarify the parties' arguments and sharpen the focus on the relevant evidence.[75] By attempting to resolve the issues internally, the scope of the dispute may be narrowed, making resolution easier for later judicial proceedings.

[36] Finally, failing to treat mandatory grievance procedures as a condition precedent would effectively make them optional. It would undermine an organization's ability to create by contract a single forum to resolve all of its internal disputes. And as one court reasoned, mandatory grievance procedures must be exhausted before seeking judicial review, because the grievance procedure "is part of the contractual bargain and defines the rights themselves."[76]

[37] The exhaustion of a mandatory grievance procedure in a contract is a condition precedent to enforcing the rights under that contract.[77] Because Armstrong's argument that the exhaustion requirement does not apply to private entities is without merit, we disagree that Clarkson's instruction was an incorrect statement of law.

Armstrong also argues that Clarkson's instruction is not a correct statement of law because the grievance policy does not expressly state that it is a condition precedent to the enforceability of Clarkson's duties under the contract. But the exhaustion of a mandatory grievance procedure in a contract is a condition precedent to enforcing the rights under that contract.[78]

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[75] *Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73 (N.D. 1991).

[76] *Berkowitz v. President & Fellows of Harvard*, 58 Mass. App. 262, 275, 789 N.E.2d 575, 585 (2003).

[77] See, *McGuire v. Continental Airlines, Inc., supra* note 51; *Lucero v. UNM Bd. of Regents, supra* note 70; *Neiman v. Yale University, supra* note 52.

[78] *Id.*

The grievance procedure does not need to expressly state that it is a condition precedent.[79] The fact that the instruction refers to an implied duty to exhaust the grievance procedure does not mean that it is an incorrect statement of law.

*(ii) Clarkson's Instruction Was Warranted by Evidence*

Clarkson's instruction was not only a correct statement of law, but it was warranted by the facts. Clarkson presented evidence that it provided a copy of the grievance policy and the grievance form to Armstrong when she was placed on probation. And the grievance procedure was mentioned in some of the student handbooks distributed to Armstrong. Clarkson presented evidence that Armstrong was aware of the policy. There was sufficient evidence to create a factual issue for the jury regarding whether the grievance policy was a term of the contract between Clarkson and Armstrong.

And Clarkson's grievance policy was clearly intended to be mandatory. The policy explains how a student may file a grievance and states that "[t]he Grievance Committee is the designated arbiter of disputes within the student community in cases, which do not involve a violation of the Student Code of Conduct . . ." and that the committee's decisions are final. This language is not unlike the language of the grievance policies found to be mandatory in the cases discussed above.[80] We do not presume that Clarkson intended its grievance procedure to be optional.

But in deciding that Clarkson's jury instruction was warranted by the evidence, we make no comment on whether any

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[79] *Id*. See, also, *Sylvain v. Spaulding Rehabilitation Hosp. Corp.*, No. 15-5475-D, 2016 WL 1125940 at *10 (Mass. Super. Mar. 23, 2016) (unpublished decision) ("the law does not require that internal grievance procedure exhaustion be compelled in express terms as a condition for making later contract claims in court").

[80] See, *McGuire v. Continental Airlines, Inc.*, *supra* note 51; *Lucero v. UNM Bd. of Regents*, *supra* note 70; *Neiman v. Yale University*, *supra* note 52.

of the exceptions to the exhaustion requirement, such as futility or inadequacy of the remedy, apply in this case.[81] While Armstrong could have filed a grievance to appeal the decision to place her on probation, it is not clear whether she could have filed a grievance to appeal the decision to withdraw her from the program after she was administratively withdrawn and was no longer a student. At trial, Armstrong testified that she believed she was not able to file a grievance after she had been withdrawn from the program. On its face, the grievance policy does not state whether a former student may file a grievance to dispute a dismissal or administrative withdrawal after the dismissal or withdrawal when the former student is no longer enrolled at the college. This argument about whether the grievance policy was available to Armstrong—and thus whether it was an adequate remedy that she was required to exhaust—is best addressed by a jury that has been instructed on the issue.

We also do not address whether Clarkson is estopped from arguing that Armstrong failed to fulfill a condition precedent based on her failure to file a grievance because of the statement made to her by Damewood, the vice president of operations, regarding her behavior's constituting a Code of Conduct violation—to which the grievance policy does not apply. Nor do we address whether Armstrong's failure to use the grievance policy is excused by the doctrine of prevention.[82] These are factual questions for the jury to decide on remand.

While Armstrong may argue to the jury that Damewood's statement excused her from exhausting Clarkson's grievance procedure, this does not mean that Clarkson's instruction was not warranted by the evidence. Armstrong argues that the

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[81] See, e.g., *Vaccaro v. City of Omaha, supra* note 48, 6 Neb. App. 410, 573 N.W.2d 798 (1998) (there are exceptions to exhaustion doctrine's application); 2 Am. Jur. 2d *Administrative Law* § 454 (2014).

[82] See, *D & S Realty v. Markel Ins. Co., supra* note 38; *Fast Ball Sports v. Metropolitan Entertainment, supra* note 16.

grievance policy is inapplicable, because it expressly does not apply to Code of Conduct violations. But Armstrong was not disciplined for violating the Code of Conduct. Armstrong was disciplined for violating the CRNA program handbook and the AANA Code of Ethics.

Armstrong's argument that the grievance policy did not apply to her is based on one issue: At the initial meeting on April 23, 2013, Damewood told Armstrong that her conduct violated the Code of Conduct.

To bring charges for a Code of Conduct violation, a member of the college community must prepare written charges and present them to the judicial advisor, Damewood. The written charges must then be presented to the accused student in writing. No written charges of violating the Code of Conduct were ever filed by anyone with Damewood, nor were any written charges ever presented to Armstrong. Outside of Damewood's statement at the first meeting, there is no evidence that the Code of Conduct was discussed. In the second meeting, at which Armstrong was given the formal notification that she was being placed on probation, Armstrong was told that she was being placed on probation for violating the CRNA program handbook's professionalism rule and the AANA Code of Ethics. At trial, when discussing the outline of the April 24 meeting at which she was placed on probation, Armstrong admitted that the basis for her probation was violation of the CRNA program handbook and the AANA Code of Ethics, not the Code of Conduct.

Armstrong's argument that the grievance procedure was inapplicable because it does not apply to Code of Conduct violations is without merit, because she was never charged with a violation of the Code of Conduct. Damewood's incorrect statement that Armstrong had violated the Code of Conduct may be relevant to an estoppel argument—made to a jury properly instructed on the exhaustion issue—but it does not mean that the instruction was not warranted by the evidence.

*(iii) Clarkson Was Prejudiced by Court's Failure to Give Requested Instruction*

Finally, we conclude that the district court's refusal to give Clarkson's proffered jury instruction on Armstrong's failure to fulfill a condition precedent by not filing a grievance was prejudicial to Clarkson. Armstrong argues that there was no prejudice to Clarkson, because the substance of the proposed instruction was covered by the court's instruction to the jury that Armstrong bore the burden of proving that she "substantially performed her part of the contract." But whether a condition precedent was met is not the same question as whether a party substantially performed a contract. As a condition precedent, using the grievance procedure would be necessary to trigger the enforceability of Clarkson's duties under the contract, but if using the grievance were merely one of Armstrong's many duties under the contract, then the jury may determine that she substantially performed her duties under the contract in spite of not filing a grievance. Armstrong's argument that the condition precedent instruction was covered in substance by the substantial performance instruction is legally incorrect. No other jury instruction adequately covered the issue of Armstrong's failure to fulfill a condition precedent by not filing a grievance.

Because Clarkson's tendered jury instruction was a correct statement of law and was warranted by the evidence, and because the failure to give this instruction was prejudicial to Clarkson, the district court erred in refusing to give Clarkson's instruction. We reverse the judgment of the district court and remand the cause for a new trial in accordance with this opinion.

4. Denial of Clarkson's Motion to Set Aside Verdict or for New Trial

Clarkson's motion to set aside verdict or motion for new trial is derivative of its other alleged errors. Having concluded that the district court committed reversible error in

failing to instruct the jury on the issue of Armstrong's alleged failure to fulfill a condition precedent by not exhausting Clarkson's grievance procedure, we conclude that the district court abused its discretion by denying Clarkson's motion for new trial.

## VI. CONCLUSION

For the reasons set forth in this opinion, we reverse the judgment of the district court and remand the cause for a new trial in accordance with this opinion.

Reversed and remanded for a new trial.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Patricia A. Knapp, appellant, v. Kevin Ruser, in his official capacity, and the University of Nebraska Board of Regents, appellees.

901 N.W.2d 31

Filed September 1, 2017. No. S-16-785.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.
4. **Fair Employment Practices: Statutes: Federal Acts.** The Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 through 48-1126 (Reissue 2010), is patterned after federal title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012), and therefore, it is appropriate to look to federal court decisions construing title VII for guidance with respect to the Nebraska act.
5. **Fair Employment Practices: Discrimination: Proof.** A prima facie case of gender discrimination requires the plaintiff to prove that he or she (1) is a member of a protected class, (2) was qualified to perform the job, (3) suffered an adverse employment action, and (4) was treated differently from similarly situated persons of the opposite sex.
6. ____: ____: ____. The test to determine whether employees are similarly situated to warrant a comparison to a plaintiff is a rigorous one and the plaintiff has the burden of demonstrating that there were individuals similarly situated in all relevant aspects to the plaintiff by a preponderance of the evidence.

7. **Fair Employment Practices: Statutes: Federal Acts.** Because Neb. Rev. Stat. § 48-1221(1) (Reissue 2010) is patterned after the federal Equal Pay Act, 29 U.S.C. § 206(d) (2012), it is appropriate to look to federal court decisions construing 29 U.S.C. § 206(d) for guidance with respect to § 48-1221(1).
8. **Claims: Fair Employment Practices: Discrimination: Wages: Proof.** When bringing a claim of wage discrimination based on sex under Neb. Rev. Stat. § 48-1221(1) (Reissue 2010), a plaintiff must first establish a prima facie case by showing by a preponderance of the evidence that (1) the plaintiff was paid less than a person of the opposite sex employed in the same establishment; (2) for equal work on jobs requiring equal skill, effort, and responsibility; (3) which were performed under similar working conditions. If a plaintiff establishes a prima facie case of wage discrimination based on sex, the burden then shifts to the defendant to prove one of the affirmative defenses set forth in § 48-1221(1).
9. **Fair Employment Practices: Proof.** A plaintiff must establish a prima facie case of retaliation under Neb. Rev. Stat. § 48-1114 (Reissue 2010) by showing (1) he or she engaged in protected conduct, (2) he or she was subjected to an adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse action.
10. ____: ____. To satisfy the adverse employment action requirement in a retaliation claim, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse. This, in turn, requires a showing that the employment action might have dissuaded a reasonable worker from reporting the alleged unlawful practice. To meet this burden, a plaintiff must demonstrate that the employment action was material, not trivial, and that it resulted in some concrete injury or harm.
11. **Claims: Fair Employment Practices: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. The public policy exception is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.

Appeal from the District Court for Lancaster County: Horacio J. Wheelock, Judge. Affirmed.

Brandon B. Hanson, of Hanson Law Offices, for appellant.

John C. Wiltse, of University of Nebraska, and David R. Buntain, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Miller-Lerman, J.

## I. NATURE OF CASE

Patricia A. Knapp filed an action against Kevin Ruser, in his official capacity, and the Board of Regents of the University of Nebraska in which she asserted claims of discriminatory wage and employment practices based on her sex as well as claims of employment retaliation. Knapp's claims arose from alleged occurrences while she was a supervising attorney for the civil clinical law program at the University of Nebraska College of Law. Knapp appeals the orders of the district court for Lancaster County in which the court sustained the defendants' motion for summary judgment and overruled her motion to alter or amend the judgment. We affirm the district court's orders.

## II. STATEMENT OF FACTS

Knapp commenced this action with a complaint filed in the district court on July 11, 2014. In that complaint, Knapp set forth eight claims for relief, some based on state law and some based on federal law. In August, the defendants had the action removed to the U.S. District Court for the District of Nebraska. In November 2015, the federal court sustained the defendants' motion for summary judgment in part and dismissed certain of Knapp's claims, which were based on federal law, with prejudice. The federal court remanded the remaining claims, which were based on Nebraska state law, to the district court for Lancaster County for further proceedings. *Knapp v. Ruser*, 145 F. Supp. 3d 846 (D. Neb. 2015). Upon remand to the state court, Knapp filed an amended

complaint which mirrored the operative amended complaint she had filed in the federal court. In the amended complaint, she set forth 10 claims for relief. The federal court had dismissed the first through third, sixth, eighth, and tenth claims. Also, it remanded the fourth, fifth, seventh, and ninth claims for further proceedings in the state court. Accordingly, our consideration on appeal is limited to the state district court's disposition of four claims identified in the operative complaint as the fourth, fifth, seventh, and ninth claims.

## 1. Background/Facts

Knapp, an attorney, began working in the civil clinic as a temporary half-time employee in the summer of 1999. At that time, the director of clinical programs was on a sabbatical, and Knapp was hired to cover the portion of his responsibilities that concerned the civil clinic. After the director returned from sabbatical and informed the college that he would be leaving at the end of the fall semester, Knapp was hired as a temporary half-time employee beginning in the spring 2000 semester. The understanding was that she would cover the former director's duties with respect to the civil clinic while the law school considered its long-term strategic plan for the clinical programs.

Knapp's half-time employment in the civil clinic ended in August 2004 after Ruser was named director of the clinical programs and the law school hired Richard Moberly to perform the duties Knapp had performed in the civil clinic. In 2006, the law school again hired Knapp as a half-time employee in the civil clinic after it determined that Moberly's half-time status was not sufficient to meet student needs. While Knapp and Moberly split duties in the civil clinic, Moberly held a full-time position which included additional responsibilities such as teaching doctrinal classes, research, and community service.

Knapp continued to work half-time in the civil clinic until August 2011, when Moberly became an associate dean of the law school and gave up his duties in the civil clinic. Knapp

and Ruser agreed that Knapp's employment as supervising attorney in the civil clinic should go to full time. Knapp's position was classified as that of "Temporary Lecturer" and was designated as a "'Special Appointment.'" Knapp met with the dean of the law school to discuss her full-time salary; the dean offered Knapp an annual salary of $80,000. After Knapp told the dean that the salary was low, the dean told Knapp that she would explore the possibility of increasing the salary by seeking a designation for the position as a "'professor of practice.'" Knapp agreed to accept the salary for the upcoming academic year based on what she believed to be the dean's "good-faith commitment" to find a way to increase her salary. When Knapp told Ruser the salary she had been offered, Ruser told her that the dean had "'low-balled'" her.

A year later, in August 2012, Ruser left a letter for Knapp setting forth proposed terms and conditions for her employment in the upcoming academic year. The letter stated that her salary would again be $80,000. Prior to receiving the letter, Knapp had had no other communication with the law school's administration regarding her salary for the upcoming year. The letter prompted Knapp to check the salaries of others working in the clinical programs. She learned from the University of Nebraska's website that a male professor had been hired in March 2012 to teach a business transactions clinic at a salary of $106,000 per year. Knapp thereafter spoke with Ruser regarding her salary, and she told him that after seeing others' salaries, she thought that the salary structure in the clinical programs was "skewed" and that the clinics had a "'gender equity' problem" that Ruser needed to address. Ruser responded that he was "'baffled'" by Knapp's allegations of discrimination and that the new male professor's higher salary was justified by the fact that his position was a tenure track position.

Knapp alleged that the conversation became heated and that afterward, Ruser's behavior and demeanor toward her changed. Knapp alleged that Ruser acted more hostile and

that he stopped adequately communicating with her. Knapp also observed that Ruser appeared to be neglecting his own duties in the clinic, including supervision of students and cases. After adopting a child in the spring semester, Ruser went to half time, and Knapp alleged that he "disengaged even further" from the clinic, with the result being that the clinic "was not fulfilling its ethical obligations to its clients or to its students."

In April 2013, Knapp learned that Ruser would be receiving a lifetime achievement award from the law school. Although other members of the clinic's staff had known of the award for several weeks and had been invited to sit at Ruser's table at the award ceremony, Ruser had not mentioned the award to Knapp. This incident prompted Knapp to conclude that her relationship with Ruser "was so badly damaged that it had become impossible for them to work together as law partners in a way that would meet their ethical obligations to their clients and to their students."

Knapp decided to leave her job at the clinic, but a coworker encouraged her to speak with the dean about what was happening in the clinic. Knapp met with the dean and informed her of several problems that she perceived in the clinic. Knapp told the dean that problems had existed for women in the clinical program since the early 1980's, when Knapp was a student at the college. Knapp informed the dean of various concerns she had regarding Ruser's management of the clinical programs, focusing on "the environment created for women in the clinical programs over the years" by Ruser and his male associates. Knapp alleged that after listening to Knapp's concerns, the dean "did not offer to help in any way but wished [Knapp] well." Knapp's employment in the clinic ended on May 31, 2013.

### 2. Federal District Court's Disposition of Claims

The federal district court concluded that because of sovereign immunity, it lacked jurisdiction to hear four of Knapp's

claims: the fourth, fifth, seventh, and ninth. Those four claims were based on state law, and the federal court found that the state statutory schemes underlying the claims were not "sufficiently explicit to effect a waiver of sovereign immunity to suit in federal court." *Knapp v. Ruser*, 145 F. Supp. 3d 846, 855 (D. Neb. 2015). The federal court therefore remanded the four claims for further proceedings in the state district court.

The federal court determined that the six remaining claims—the first through third, sixth, eighth, and tenth—were asserted under federal law and that Congress had abrogated states' sovereign immunity for those claims. The court stated that five of the claims arose under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012) (Title VII), and that the remaining claim arose under the Equal Pay Act, 29 U.S.C. § 206(d) (2012) (EPA). The federal district court considered the six claims. It found merit to the defendants' motion for summary judgment and dismissed the six claims.

The federal court stated that Knapp's first claim was fashioned as a claim of disparate impact under Title VII. The court determined that Knapp's disparate impact claim failed because she had not alleged any facially neutral employment policy that had a disparate impact on a protected class and instead had alleged a practice that was not facially neutral. The court characterized Knapp's allegations as an allegation of disparate treatment rather than disparate impact and concluded that Knapp had not pled a prima facie case for disparate impact. The court therefore dismissed Knapp's first claim.

The federal court next considered Knapp's second, sixth, and eighth claims, which were fashioned as claims of disparate treatment and discrimination (the second and eighth claims, respectively) under Title VII and a claim of wage discrimination under the EPA (the sixth claim). The court set forth the requirements of a prima facie claim of disparate treatment or discrimination under Title VII and stated that a prima facie claim of wage discrimination under the EPA was sufficiently similar to examine the claims together. The court stated that in order to prevail on each of these claims, Knapp

needed to identify similarly situated males who were treated differently from her. Construing the facts in a light most favorable to Knapp, the court determined that her claims failed because "she [had] not shown any similarly situated male comparators who were treated differently." *Knapp*, 145 F. Supp. 3d at 858. The court stated that by Knapp's own admission, the males to whom she compared herself performed work or held duties that differed substantially from her own. Such duties included directing clinical programs, undertaking academic research, and performing community service, none of which were part of Knapp's position, which focused solely on teaching.

The federal court stated that although Knapp argued her Title VII claims as failure to promote and wage discrimination, the evidence she presented was more consistent with a failure to hire. The court noted that Knapp compared her nontenured position to tenured positions held by male employees, and the court stated that "the uncontroverted evidence [was] that Knapp could only become eligible for tenure if she were hired into a tenure-eligible position." *Knapp v. Ruser*, 145 F. Supp. 3d 846, 857 (D. Neb. 2015). The court considered Knapp's claims as failure-to-hire claims but determined that the claims still failed under such characterization. The court stated Knapp did not allege that she had applied for any tenure-eligible position or that anyone represented that her position would be eligible for tenure, and it stated that instead the uncontroverted evidence was that Knapp and the college mutually understood that her position was not eligible for tenure.

The federal court determined that "[t]he uncontroverted evidence . . . demonstrates that Knapp held a position with substantially different duties from her male colleagues" and that "she never applied for a position similar to those they held." *Id.* at 859. The court concluded that Knapp "failed to allege facts sufficient for a reasonable jury to find that she suffered less favorable treatment than the Defendants gave to similarly situated individuals outside of her protected class."

*Id.* The court therefore dismissed Knapp's second, sixth, and eighth claims.

Knapp's third claim was fashioned as a constructive discharge claim under Title VII. The federal court rejected the claim for two reasons. First, the court determined that Knapp had not alleged facts sufficient for a jury to conclude that a reasonable person would have found the conditions of employment intolerable. The court noted that Ruser's less frequent communication with Knapp, his personal slights against her, and his alleged disengagement from his own duties were not enough to create a cognizable constructive discharge claim. Second, the court determined that although Knapp had aired certain grievances with the dean, she did not give the law school an opportunity to correct the problems before she resigned, and that her complaints were focused on long-term problems in the clinic rather than her immediate problems with Ruser. The court dismissed Knapp's third claim.

For similar reasons, the court rejected Knapp's tenth claim, which it characterized as an employment retaliation claim under Title VII. The court determined that "a reasonable jury could not conclude that Ruser's alleged conduct constituted an adverse employment action." *Knapp*, 145 F. Supp. 3d at 861. The court stated that "Knapp acknowledge[d] that her strained relationship with Ruser did not interfere with her ability to perform her duties" and that the evidence did not support her "assertion that Ruser's alleged neglect of his own cases somehow affected her duties." *Id.* at 862. The court dismissed Knapp's tenth claim.

### 3. State Court's Disposition of Remanded Claims

Having dismissed the six claims that were based on federal law, the federal district court remanded Knapp's fourth, fifth, seventh, and ninth claims, which were based on state law, to the state district court for further proceedings. On remand, the defendants moved for summary judgment on those claims. The state district court applied the familiar framework found in

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and after a hearing determined that Knapp's evidence failed to show a prima facie case of discrimination. The state district court sustained the defendants' motion for summary judgment.

In its order ruling on the defendants' motion for summary judgment, the district court began its analysis by noting that three of the four remanded claims arose under Nebraska statutes that were patterned on analogous federal laws. The court stated that in Knapp's fourth claim, she asserted a discriminatory wage practice claim under Neb. Rev. Stat. §§ 48-1219 through 48-1227.01 (Reissue 2010), which statutes the court characterized as the state equivalent of the federal EPA. The court stated that in her fifth and seventh claims, Knapp alleged violations of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 through 48-1126 (Reissue 2010 & Cum. Supp. 2014) (NFEPA), which the court characterized as the state equivalent of federal Title VII. The court noted that this court has held that Nebraska antidiscrimination laws are to be interpreted in the same manner as their federal counterparts. The court cited Nebraska appellate court cases looking to federal decisions construing Title VII for guidance to interpret the NFEPA. Extrapolating from the reasoning of those cases, the district court concluded it should apply a similar approach and looked to federal decisions construing the EPA for guidance regarding §§ 48-1219 through 48-1227.01.

The court first considered Knapp's fourth claim, regarding discriminatory wage practices, under §§ 48-1219 through 48-1227.01. Using a rationale similar to that used by the federal court when it rejected Knapp's sixth claim, for wage discrimination under the EPA, the court rejected this claim. The court indicated that the claim was specifically based on § 48-1221(1). The court determined that Knapp had failed to show any male employees who performed comparable work and that therefore, she could not establish a prima facie case of wage discrimination under § 48-1221(1). The court stated that the male professor who was hired in March 2012 had

duties that Knapp did not have, mainly related to the task of creating a new entrepreneurship clinic. This task required him to attend meetings with faculty and the dean and to perform community outreach and academic research, as well as performing administrative tasks involved in establishing the new clinic. The court determined that three other men to whom Knapp compared herself were members of the college faculty who had administrative and other duties that Knapp did not have as a temporary member of the nontenured staff of the college. As a temporary lecturer, Knapp was assigned exclusively to teach students and did not have responsibilities to conduct academic research or perform community service. The court also noted that Knapp had never applied for a position offering the possibility of tenure. The court granted summary judgment in favor of the defendants on Knapp's fourth claim because she had not presented sufficient evidence of comparable individuals to make a prima facie inference of discriminatory wages under § 48-1221(1).

The court next considered Knapp's fifth claim, which it characterized as a claim of discrimination on the basis of sex under the NFEPA. The court determined that Knapp's discrimination claim under the NFEPA failed for the same reason that her eighth claim, for discrimination under Title VII, had failed in the federal district court. The court noted that the NFEPA mirrors Title VII and that in order to establish a prima facie case for sex discrimination, a plaintiff needed to show, inter alia, that similarly situated males were treated differently. The court determined that Knapp had failed to identify any similarly situated males who were treated differently from her and that therefore, she had failed to show a prima facie case of discrimination under the NFEPA. The court also addressed Knapp's argument that the defendants failed to hire her for better-paying positions with the opportunity for tenure. The court agreed with the federal district court's analysis to the effect that this argument failed because Knapp had not presented any evidence that she had applied for any tenure-eligible positions. The court therefore granted summary

judgment in favor of the defendants on Knapp's fifth claim, of discrimination under the NFEPA.

The court characterized Knapp's seventh claim as a claim of employment retaliation under the NFEPA. Knapp argued that Ruser had created a hostile work environment and had unreasonably interfered with her work performance after she complained to him regarding sex discrimination in the clinic. The court rejected Knapp's retaliation claim under the NFEPA based on reasoning similar to that of the federal district court when it rejected Knapp's tenth claim, of employment retaliation under Title VII. The court determined that Knapp had failed to show that a reasonable person would have found the conditions of employment intolerable or that the defendants either intended to force her to resign or could have reasonably foreseen that she would do so as a result of their actions. The court therefore granted summary judgment in favor of the defendants on Knapp's seventh claim, of employment retaliation under the NFEPA.

Finally, the court characterized Knapp's ninth claim as a public-policy-based claim of retaliation. Knapp alleged that the defendants had retaliated against her "for attempting to prevent ethical issues in a learning setting for future lawyers . . . in contravention of public policy." Knapp argued that the civil clinic was a de facto law firm and that it was therefore subject to duties required of law firms in Nebraska. The district court cited *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007), and stated that this court has recognized a public policy exception to the at-will employment doctrine and that under the public policy exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. The court rejected Knapp's public policy retaliation claim for much the same reasons it rejected her claim of employment retaliation under the NFEPA. The court determined that Knapp had "failed to show how Ruser's absence or refusal to communicate following their heated conversation resulted in her discharge or demotion." The court noted that certain of Knapp's concerns

regarding Ruser's management of the clinical programs "were longstanding" and that she did not express those concerns to anyone in the college prior to April 2013. The court further determined that "even after Ruser became withdrawn, [Knapp] was able to fulfill her ethical obligations and performance" in the clinic, and that there was "no evidence that Ruser's work on his own cases could compel a reasonable person in [Knapp's] position to resign." The court granted summary judgment in favor of the defendants on Knapp's ninth claim, of public policy retaliation.

The district court concluded its order by stating that Knapp had "failed to establish a prima facie case of wage discrimination, failure to promote because of sex, retaliation, and retaliation in violation of public policy." The court therefore sustained the defendants' motion for summary judgment with respect to Knapp's fourth, fifth, seventh, and ninth claims. The court overruled Knapp's subsequent motion to alter or amend its judgment.

Knapp appeals the district court's orders sustaining the defendants' motion for summary judgment and overruling her motion to alter or amend its judgment.

## III. ASSIGNMENTS OF ERROR

Knapp generally claims that the district court erred when it sustained the defendants' motion for summary judgment on her fourth, fifth, seventh, and ninth claims and when it overruled her motion to alter or amend the judgment.

Knapp specifically claims, restated, that the district court erred when it (1) analyzed her fifth claim as a claim of failure to hire but failed to analyze it as a claim of impermissible classification under the NFEPA; (2) determined, with regard to her fifth claim, that she failed to show that there were similarly situated male employees who were treated differently; (3) determined, with regard to her fourth claim, regarding wage discrimination under § 48-1221(1), that she failed to show that there were male employees who performed comparable duties; and (4) determined that she failed, with

regard to both her seventh claim, of employment retaliation under the NFEPA, and her ninth claim, of public-policy-based retaliation, to show retaliatory or unreasonable conduct by Ruser.

We note that Knapp also claims that the federal district court erred when it sustained the defendants' motion for summary judgment with respect to her first through third, sixth, eighth and tenth claims. She requests that we reverse the federal district court's order sustaining the defendants' motion for summary judgment on those claims. Under federal law, when a federal district court grants summary judgment on certain claims and remands the remaining claims to a state court, the federal district court's partial summary judgment becomes final as to the claims on which the federal district court granted summary judgment and the federal district court's resolution of those claims is appealable to the federal circuit court. See *Porter v. Williams*, 436 F.3d 917 (8th Cir. 2006). The federal district court's order in *Knapp v. Ruser*, 145 F. Supp. 3d 846 (D. Neb. 2015), as a final judgment as to those claims upon which the federal court granted summary judgment, is appealable to a federal circuit court, and we do not review the federal district court's resolution of those claims.

## IV. STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Thomas v. Board of Trustees*, 296 Neb. 726, 895 N.W.2d 692 (2017). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for

an abuse of discretion. *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016).

## V. ANALYSIS

Knapp generally claims that the district court erred when it sustained the defendants' motion for summary judgment on her fourth, fifth, seventh, and ninth claims generally for the reason that Knapp's evidence failed to show a prima facie case of discrimination, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and when it overruled her motion to alter or amend the judgment. She also assigns specific errors, each of which relates to one or more of the claims. We will review the district court's ruling as to each claim and Knapp's specific arguments as to each claim in turn.

### 1. Fifth Claim: Discrimination Under the NFEPA

Knapp's fifth claim was based on the NFEPA. The district court analyzed Knapp's fifth claim as a claim of discrimination based on sex under the NFEPA; the court specifically addressed Knapp's arguments that it characterized as a failure-to-hire claim. On appeal, Knapp makes two main arguments with regard to her fifth claim: (1) that the district court erred when it failed to analyze the fifth claim as a claim of improper classification under the NFEPA and (2) that the court erred when it determined that she had failed to show similarly situated male employees who were treated differently. Knapp claims that because of these errors, the district court erred when it sustained the defendants' motion for summary judgment on her fifth claim and that the court abused its discretion when it overruled her motion to alter or amend the judgment in order to consider the fifth claim as a claim of improper classification.

[4] We note first that we have stated that the NFEPA is patterned after federal Title VII and that it is appropriate to look to federal court decisions construing Title VII for guidance

with respect to the NFEPA. See *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 885 N.W.2d 675 (2016). Like the plaintiff's claim in *Hartley*, Knapp's fifth claim is a claim of disparate treatment, that is, "a claim based on an employer's treating some people less favorably than others because of their race, color, religion, sex, or other protected characteristics." 294 Neb. at 891, 885 N.W.2d at 692-93. In *Hartley*, we looked to federal case law applying Title VII, specifically *McDonnell Douglas Corp., supra*, to provide a framework for a discrimination claim under the NFEPA. We noted in *Hartley* that the *McDonnell Douglas Corp.* framework is not the exclusive method of proving disparate treatment, but in this case, as in *Hartley*, the district court used that framework and the parties do not dispute that it was the appropriate approach.

The first step under the *McDonnell Douglas Corp.* framework is that "first the plaintiff has the burden of proving a prima facie case of discrimination." *Hartley*, 294 Neb. at 893, 885 N.W.2d at 693. In *Hartley*, the plaintiff set forth a failure-to-promote claim, and therefore, we stated that a prima facie case of discrimination in that case consisted of "demonstrating (1) the employee is a member of a protected group, (2) the employee was qualified and applied for a promotion to an available position, (3) the employee was rejected, and (4) a similarly situated employee, not part of the protected group, was promoted instead." 294 Neb. at 893, 885 N.W.2d at 693.

[5,6] We note, however, that courts typically modify the formulation of a prima facie case of employment discrimination based on the specific type of discrimination claimed in a specific case. Although the requirements set forth in *Hartley* focused on a claim of failure to promote, the Nebraska Court of Appeals in *Helvering v. Union Pacific RR. Co.*, 13 Neb. App. 818, 703 N.W.2d 134 (2005), set forth a more universal formulation of the required showing for a prima facie case of gender discrimination. The Court of Appeals stated that a "prima facie case of gender discrimination requires

the plaintiff to prove that he or she (1) is a member of a protected class, (2) was qualified to perform the job, (3) suffered an adverse employment action, and (4) was treated differently from similarly situated persons of the opposite sex." *Helvering*, 13 Neb. App. at 842, 703 N.W.2d at 154 (citing *Riggs v. County of Banner*, 159 F. Supp. 2d 1158 (D. Neb. 2001) (considering Title VII claim of discrimination based on sex)). The Court of Appeals further stated that the test to determine whether employees are similarly situated to warrant a comparison to a plaintiff is a rigorous one and that the plaintiff has the burden of demonstrating that there were individuals similarly situated in all relevant aspects to the plaintiff by a preponderance of the evidence. *Helvering, supra* (citing *E.E.O.C. v. Kohler Co.*, 335 F.3d 766 (8th Cir. 2003) (considering Title VII retaliation claim based on race)).

(a) Classification

Knapp claims that the district court erred because it failed to analyze her fifth claim as a claim of improper classification under the NFEPA. She raises this argument in connection with her claims of error with respect to the court's grant of summary judgment and its overruling of her motion to alter or amend the judgment.

Knapp's fifth claim was based on § 48-1104, which is part of the NFEPA and which provides as follows:

> It shall be an unlawful employment practice for an employer:
>
> (1) To fail or refuse to hire, to discharge, or to harass any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin; or
>
> (2) To limit, advertise, solicit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an

> employee, because of such individual's race, color, religion, sex, disability, marital status, or national origin.

Knapp maintains that the district court analyzed her fifth claim as a claim under only § 48-1104(1), which makes it an unlawful employment practice to, inter alia, "fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to compensation . . . because of such individual's . . . sex." She contends that the court should have also analyzed the claim as a claim under § 48-1104(2), which makes it an unlawful employment practice to, inter alia, "classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee, because of such individual's . . . sex."

In support of her contention that the court analyzed the claim only under subsection (1) and not under subsection (2), Knapp focuses on the portion of the district court's summary judgment analysis in which it considered the failure-to-hire aspects of the fifth claim. However, in addition to considering the claim specifically as a failure-to-hire claim, the district court also analyzed the claim as a more generalized claim of discrimination utilizing the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Knapp contends that she showed a prima facie case of improper classification under that framework, and she does not offer an alternative approach.

Although Knapp used "classification" language in her complaint, and we acknowledge that the district court did not specifically refer to her fifth claim as one of improper "classification," this is of no legal consequence. We believe that a claim of improper classification under § 48-1104(2) is subject to the *McDonnell Douglas Corp.* framework and that in such a case, the "adverse employment action" is an improper classification, which must be demonstrated by evidence of prima facie discrimination. In this case, the district court used the *McDonnell Douglas Corp.* framework and determined that Knapp had failed to show that there were similarly situated

male employees who were treated differently. As a consequence of this determination, the court effectively determined that Knapp had failed to show similarly situated male employees who were classified differently than she was and that therefore, she failed to show a prima facie case of discrimination resulting from an improper classification under § 48-1104(2).

(b) Similarly Situated

Knapp further argues that the court erred when it determined with respect to her fifth claim that she failed to show similarly situated male employees who were treated differently. As noted above, this finding was dispositive of the improper classification aspects of Knapp's claim as well as the other aspects of the claim. Knapp argues that she presented evidence of similarly situated males because she presented evidence that male employees were moved from nontenure positions into tenure track positions with higher pay.

The district court determined that Knapp failed to show similarly situated males because the males to whom she compared herself had duties that were different from or in addition to the duties that she performed. Because Knapp did not show the existence of males who were similarly situated, she could not show that males were treated differently. Any differences in compensation or classification could be explained by the differences in duties.

Knapp argues that the men were treated differently because they moved on to tenure track positions. But when the men moved on to such positions, they took on additional duties and therefore were no longer similarly situated. Therefore, to the extent that Knapp compares herself to male employees who moved on to tenure track positions while she did not, her argument is no longer that she was treated differently from similarly situated male employees. Instead, her argument is more properly characterized as a failure to promote or a failure to hire claim because she is arguing the male employees were able to move into tenure positions while she was not.

The district court analyzed Knapp's fifth claim as a failure to hire claim, and the court determined that the claim failed as such because Knapp did not show that she had attempted to obtain a tenure track position and therefore could not show that the defendants refused to hire her for or promote her to such a position.

Viewing the evidence in the light most favorable to Knapp, we find she did not present evidence of similarly situated males, and therefore, she was unable to show under § 48-1104(1) that they were treated differently, whether such different treatment was with respect to compensation, classification, or hiring for or promotion to tenure track positions.

We conclude that with respect to Knapp's fifth claim under § 48-1104(1) and (2), the district court did not err when it reached the determinations noted above and sustained the defendants' motion for summary judgment and overruled Knapp's subsequent motion to alter or amend challenging such determinations.

### 2. Fourth Claim: Discriminatory Wage Practices Based on Sex

Knapp's fourth claim was a claim of wage discrimination based on sex under §§ 48-1219 through 48-1227.01. The district court determined that Knapp had failed to identify a male employee with comparable duties and therefore had not shown that a male employee performing the same duties was paid more. Knapp claims that the district court erred when it determined that she failed to show male employees who had comparable duties.

[7] As an initial matter, we note that the specific statute that underlies Knapp's fourth claim is § 48-1221(1), which provides:

> No employer shall discriminate between employees in the same establishment on the basis of sex, by paying wages to any employee in such establishment at a wage rate less than the rate at which the employer pays any employee of the opposite sex in such establishment for equal work

> on jobs which require equal skill, effort and responsibility under similar working conditions. Wage differentials are not within this prohibition where such payments are made pursuant to: (a) An established seniority system; (b) a merit increase system; or (c) a system which measures earning by quantity or quality of production or any factor other than sex.

Knapp's sixth claim, which was dismissed by the federal district court, was a claim of wage discrimination under the federal EPA, 29 U.S.C. § 206(d)(1), which provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The state and federal statutes are similar, and the Nebraska statute appears to be patterned after the federal statute. Therefore, similarly to our holding in *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 885 N.W.2d 675 (2016), noted above with regard to the NFEPA and Title VII, we hold that because § 48-1221(1) is patterned after the federal EPA, 29 U.S.C. § 206(d), it is appropriate to look to federal court decisions construing 29 U.S.C. § 206(d) for guidance with respect to § 48-1221(1).

The district court in this case looked to federal court decisions construing the federal EPA when it analyzed Knapp's fourth claim. The court cited *Price v. Northern States Power Co.*, 664 F.3d 1186, 1191 (8th Cir. 2011), in which the U.S. Court of Appeals for the Eighth Circuit stated that when bringing a claim of pay discrimination on the basis of sex pursuant to the federal EPA, "[a] plaintiff must first establish a prima facie case that women were paid less than men in the same establishment for equal work requiring equal skill, effort, and responsibility and performed under similar working conditions" and that "[i]f a plaintiff establishes a prima facie case, the burden then shifts to the defendant to prove one of [the] statutory affirmative defenses." We note that in *Hunt v. Nebraska Public Power Dist.*, 282 F.3d 1021 (8th Cir. 2002), the Court of Appeals for the Eighth Circuit formulated the prima facie case under the EPA as follows: To establish an equal pay claim, a plaintiff must show by a preponderance of the evidence that (1) she was paid less than a male employed in the same establishment; (2) for equal work on jobs requiring equal skill, effort, and responsibility; (3) which were performed under similar working conditions.

[8] We believe that the framework applicable to a federal EPA claim is also the proper framework to be applied to a claim under § 48-1221(1) for wage discrimination based on sex. Therefore, when bringing a claim of wage discrimination based on sex under § 48-1221(1), a plaintiff must first establish a prima facie case by showing by a preponderance of the evidence that (1) the plaintiff was paid less than a person of the opposite sex employed in the same establishment; (2) for equal work on jobs requiring equal skill, effort, and responsibility; (3) which were performed under similar working conditions. If a plaintiff establishes a prima facie case of wage discrimination based on sex, the burden then shifts to the defendant to prove one of the affirmative defenses set forth in § 48-1221(1).

Using this general framework to analyze Knapp's fourth claim, the district court concluded that Knapp had not

established a prima facie case of wage discrimination, because she had not shown that the male employees to whom she compared herself were performing comparable duties. The court determined that "[a]lthough all faculty named by Knapp as comparators also taught in the clinics as part of their positions, the totality of their duties were [sic] not substantially equal." The court noted that while their positions shared certain duties that Knapp performed, each of the male employees had additional responsibilities including some combination of classroom teaching, research, and service to the faculty, administration, and community.

In terms of the requirements of a prima facie case of wage discrimination based on sex set forth above, we read the district court's determinations as a ruling that Knapp failed to show a male employee who was doing "equal work on jobs requiring equal skill, effort, and responsibility." See *Hunt v. Nebraska Public Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002). Specifically, the court determined that the male employees to whom Knapp compared herself performed work that required additional responsibilities.

In this regard, we note that the Eighth Circuit Court of Appeals in *Hunt* explained the required showing of "equal work" by stating that the jobs need not be identical to be considered "'equal'" under the EPA and they need only be substantially equal. 282 F.3d at 1029. The court further stated that neither job classifications nor titles are dispositive for determining whether jobs are equal for purposes of the EPA and that determining whether two jobs are substantially equal requires a practical judgment on the basis of all the facts and circumstances of a particular case, including factors such as level of experience, training, education, ability, effort, and responsibility. *Hunt, supra*. The court further stated that two jobs could require insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility and still be substantially equal. *Id*. We find these standards to be sound, and we adopt them and apply them to this case.

With these considerations in mind, we determine that Knapp's evidence did not show that the male employees to whom she compared herself were doing "equal work . . . requiring equal . . . responsibility." See *Hunt*, 282 F.3d at 1029. The evidence showed that the male employees had additional responsibilities that were not insubstantial or minor differences from the work Knapp was doing. We conclude therefore that the district court did not err when it sustained the defendants' motion for summary judgment on Knapp's fourth claim; nor did the court abuse its discretion when it overruled Knapp's motion to alter or amend such judgment.

### 3. Seventh Claim: Retaliation Under the NFEPA

Knapp's seventh claim was a claim of retaliation under the NFEPA. Knapp claims on appeal that the district court erred in its determination that she had failed to show that a reasonable person would have found the conditions of employment intolerable or that the defendants either intended to force her to resign or could have reasonably foreseen that she would do so as a result of their actions.

[9] A claim of retaliation under the NFEPA is based on § 48-1114, which provides in relevant part that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his or her employees . . . because he or she . . . has opposed any practice made an unlawful employment practice by the [NFEPA]." The Nebraska Court of Appeals in *Helvering v. Union Pacific RR. Co.*, 13 Neb. App. 818, 703 N.W.2d 134 (2005), noted that the framework for a claim of retaliation under the NFEPA is the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), used for other unlawful employment practice claims under the NFEPA as set forth above in connection with our analysis of Knapp's fifth claim. The Court of Appeals for the Eighth Circuit set forth the formulation of a prima facie case in a retaliation claim as being that a plaintiff must establish such case by showing (1) he or she

engaged in protected conduct, (2) he or she was subjected to an adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse action. See *Wood v. SatCom Marketing, LLC*, 705 F.3d 823 (8th Cir. 2013). The same formulation applies to set forth a prima facie case of retaliation under § 48-1114.

Knapp's claim of retaliation under the NFEPA was that she had engaged in a protected activity when she opposed practices by Ruser that she alleged amounted to discrimination based on sex. The district court determined that the claim failed because Knapp had not shown that she "'suffered an adverse employment decision.'" Knapp did not allege that the law school had terminated her employment because she had complained to Ruser or to the dean; instead, she argued that after she complained to Ruser, he created an environment that drove her to leave her employment. The district court determined that Knapp's evidence on summary judgment regarding Ruser's behavior did not rise to the level of an adverse employment action.

[10] To satisfy the "adverse employment action" requirement in a retaliation claim, see *Helvering*, 13 Neb. App. at 842, 703 N.W.2d at 154, a plaintiff must show that "a reasonable employee would have found the challenged action materially adverse," see *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). This, in turn, requires a showing that the employment action "'might have "dissuaded . . ."'" a reasonable worker from reporting the alleged unlawful practice. *Id.* To meet this burden, a plaintiff must demonstrate that the employment action was material, not trivial, and that it resulted in some concrete "'injury or harm.'" *AuBuchon v. Geithner*, 743 F.3d 638, 644 (8th Cir. 2014). In this regard, it has been noted that reporting discriminatory behavior "'cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.'" *Id*. (quoting *White, supra*).

Viewing Knapp's evidence in the light most favorable to her and applying the standards set forth above, we determine that Knapp did not show the sort of "adverse employment action" necessary to support a claim of retaliation under § 48-1114 of the NFEPA. Ruser's alleged change in attitude and the behaviors he displayed after Knapp raised concerns regarding gender discrimination are more properly characterized as "petty slights" and "minor annoyances" than as the sort of actions a reasonable employee would have found to be materially adverse and that would have resulted in some concrete injury or harm. We therefore conclude that the district court did not err when it sustained the defendants' motion for summary judgment as to Knapp's seventh claim; nor did the court abuse its discretion when it overruled Knapp's motion to alter or amend such judgment.

4. Ninth Claim: Public Policy Retaliation

Finally, Knapp's ninth claim was a claim of retaliation based on public policy considerations. Similar to its disposition of the seventh claim, the district court rejected this claim on the basis that Knapp's evidence did not show material retaliatory conduct. Knapp claims on appeal that the district court erred in this determination because, she argues, she and Ruser were "de facto law partners" and because ethical concerns relating to law firms give rise to a public policy claim and require that a different standard be used to determine whether there was retaliation. Brief for appellant at 33.

[11] Knapp argues that her ninth claim is cognizable as a "tort-based claim for retaliation when it violates public policy," *id.* at 31, and she cites *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007), as support for this theory. In *Trosper*, we recognized that generally, an employer may terminate the employment of an at-will employee at any time, but we recognized a public policy exception to the at-will employment doctrine. We described the exception as follows:

> Under the public policy exception, we will allow an employee to claim damages for wrongful discharge when

> the motivation for the firing contravenes public policy. The public policy exception is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.

*Trosper*, 273 Neb. at 857-58, 734 N.W.2d at 707. The specific exception noted in *Trosper* originated in *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003), where we recognized a public policy exception to the at-will employment doctrine and allowed an action for retaliatory discharge when an employee has been discharged for filing a workers' compensation claim. *Trosper* extended *Jackson* to include a claim for retaliatory demotion for filing a workers' compensation claim.

Knapp argues that a public policy exception should be recognized to allow her ninth claim and that the public policy supporting her claim consists of ethical considerations governing the legal profession and law firms as expressed in the Nebraska Rules of Professional Conduct. She contends that the defendants retaliated against her because she raised ethical concerns regarding Ruser's conduct at the civil clinic.

Whether or not a public policy exception related to such ethical concerns should be recognized, we note that in cases like *Trosper*, the public policy exception is fashioned as an exception to the at-will employment doctrine. As such, the exception has been limited to claims of retaliatory discharge and, as extended in *Trosper*, claims of retaliatory demotion. Knapp's evidence does not show that the defendants either discharged or demoted her after she raised ethical concerns; nor does it show a constructive discharge or some other adverse employment action that falls short of a discharge or demotion. As we noted in connection with Knapp's seventh claim for retaliation under the NFEPA, Knapp has not shown any

adverse employment action that was material and that resulted in some concrete injury or harm.

Viewing the evidence in the light most favorable to Knapp, we determine she has not shown employment-related retaliation that would give rise to a claim based on public policy. Therefore, we conclude that the district court did not err when it sustained the defendants' motion for summary judgment on Knapp's ninth claim; nor did the court abuse its discretion when it overruled Knapp's motion to alter or amend such judgment.

## VI. CONCLUSION

We conclude that the district court did not err when it sustained the defendants' motion for summary judgment with respect to Knapp's fourth, fifth, seventh, and ninth claims and that it did not abuse its discretion when it overruled Knapp's subsequent motion to alter or amend its judgment. We therefore affirm the district court's orders.

Affirmed.

Stacy, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Estate of Gilbert R. Fuchs, deceased. Jim R. Fuchs, Copersonal Representative of the Estate of Gilbert R. Fuchs, deceased, appellant, and Joseph M. Fuchs, Copersonal Representative of the Estate of Gilbert R. Fuchs, deceased, appellee, v. Julie K. Albin and Jason R. Fuchs, appellees.

900 N.W.2d 896

Filed September 8, 2017. Nos. S-16-694, S-16-849.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** Appellate courts independently review questions of law decided by a lower court.
5. **Decedents' Estates: Limitations of Actions.** Under the Uniform Probate Code, the general rule is that no appointment or testacy proceeding may be commenced more than 3 years after the death.
6. ____: ____. Under the Uniform Probate Code, the statute of limitations is self-executing and ordinarily begins to run upon the decedent's death.
7. **Decedents' Estates: Statutes: Appeal and Error.** In interpreting the various sections of the Nebraska Probate Code, an appellate court may examine the comments to the code.

8. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
9. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
10. **Estoppel: Words and Phrases.** Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations.
11. **Estoppel: Fraud.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.
12. **Summary Judgment: Evidence.** Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.
13. **Limitations of Actions.** The doctrine of equitable tolling permits a court to excuse a party's failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstance beyond his or her control, the plaintiff cannot be expected to file suit on time.
14. ____. Equitable tolling requires no fault on the part of the defendant.
15. ____. Equitable tolling requires due diligence on the part of the claimant.

Appeals from the District Court for Pierce County: Mark A. Johnson, Judge. Affirmed.

George H. Moyer, of Moyer & Moyer, for appellant.

Susan J. Spahn, of Endacott, Peetz & Timmer, P.C., L.L.O., for appellees Julie K. Albin and Jason R. Fuchs.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

Jim R. Fuchs, a son of Gilbert R. Fuchs and a copersonal representative of Gilbert's estate, appeals from the district court's order that dismissed his amended application to probate Gilbert's will. Jim alleged that he learned about Gilbert's will more than 3 years after he and his brother commenced an informal probate proceeding to administer Gilbert's intestate estate. The district court granted summary judgment to Gilbert's other two children, who had objected to probating the will, and dismissed the amended petition under Neb. Rev. Stat. § 30-2408 (Reissue 2016) as time barred.

## BACKGROUND

### Factual Background

Gilbert died on May 29, 2012. At the time of his death, Gilbert was unmarried and was survived by his four children: Jim, Joseph M. Fuchs, Julie K. Albin, and Jason R. Fuchs.

Gilbert was living in Norfolk, Nebraska, when he died, but he owned two houses, one in Norfolk and the other on the family farm. Both homes were in a state of disarray, with papers strewn all about.

Gilbert did not keep his important documents well organized, often leaving them lying about his houses or piled in his cars. Some of Gilbert's cars were sold after his death, and the subsequent purchasers would mail to the children various documents and photographs they had found inside the vehicles.

Either before or after his death, each of the children had access to Gilbert's homes. Jim, Julie, and Jason searched

Gilbert's homes for his important documents, such as a will, deeds, and car titles. Jim attempted to find Gilbert's will by calling attorneys in the area and checking for safe deposit boxes at banks Gilbert had done business with. Both Jim and Joseph checked with surrounding courthouses for the presence of a will. Julie and Jason cleaned out Gilbert's houses and placed papers and other items in storage totes, two of which Julie took back to her home in Chicago, Illinois. Despite the parties' efforts, no will was found.

On July 8, 2015, Joseph received a plain brown envelope. The envelope was postmarked July 6, 2015, from Omaha, Nebraska. Inside the envelope, Joseph found Gilbert's last will and testament, dated January 26, 1987. In that will, Gilbert left all his property to Jim and named Jim as his personal representative. Joseph delivered the will to Jim.

## Lower Court Proceedings

On June 12, 2012, Jim and Joseph filed an "Application for Informal Appointment of Personal Representative in Intestacy" in the county court for Pierce County, Nebraska. In their application, they alleged that after the exercise of reasonable diligence, they were unaware of any unrevoked testamentary instrument relating to property having a situs in the state. As a result, they were appointed as copersonal representatives.

The matter was still being probated, when, on July 15, 2015, Jim filed a petition for the formal probate of Gilbert's 1987 will. Julie and Jason (hereinafter collectively the objectors) objected to the probate and Jim's appointment. On August 24, Jim transferred his probate application from county court to district court.

In September 2015, the objectors filed a supplemental answer to Jim's application. They alleged that in June 2012, Jim and Joseph applied for informal appointment as copersonal representatives of Gilbert's intestate estate and received that appointment on the same day; that Jim's probate application

was time barred under § 30-2408 because it had been more than 3 years since Gilbert's death and the informal appointment proceedings; that Jim was estopped from seeking a probate by a memorandum of understanding, which Jim had signed while acting as a copersonal representative of Gilbert's intestate estate; and that because Jim and Joseph had already sold estate property and made partial distributions of the estate, Gilbert's will could no longer be probated. They also objected to Jim's appointment as copersonal representative, because they had previously petitioned to remove Jim and Joseph as informal copersonal representatives, which petition was still pending before the county court.

The objectors moved for summary judgment. Jim then moved to file an amended application in which he had alleged for the first time that Joseph showed him Gilbert's 1987 will on July 13, 2015, 2 days before Jim filed his original application for a formal probate. He alleged that Joseph received Gilbert's will in the mail on July 8, 2015, in an envelope that was postmarked in Omaha but had no return address. He alleged that when Gilbert died, he had two residences and his legal documents were strewn about in both houses. He believed that one of the persons who had helped search for a will had found one and then waited to disclose it until the 3-year statute of repose had expired. He alleged that "all parties hereto should now be estopped to claim that the will be denied probate."

The objectors filed an amended answer where they alleged Jim told the objectors that Gilbert did not leave a will and that Jim had scheduled a family meeting with an attorney for June 4, 2012, 6 days after Gilbert's death. The objectors alleged that in reliance on Jim's representation, they agreed to the administration of Gilbert's intestate estate by Jim and Joseph and subsequently incurred over $120,000 in attorney fees and costs related to that administration and also to protect Gilbert's estate. They also alleged that before Gilbert's death, Jim said he had heard that Gilbert had made a will leaving his estate

to Jim, and that Jim had ample opportunity to investigate whether such a will existed. They also alleged the amended petition was frivolous and sought attorney fees.

In June 2016, the court issued an order sustaining the objectors' motion for summary judgment. According to the court's findings, documents that were gathered up from Gilbert's home after his death were placed in storage totes. Julie took two of these totes home with her to Chicago without the personal representatives reviewing the documents first, but other totes remained in Gilbert's house. The court noted that Julie had found an old ledger in which Gilbert noted an expense for a "'farm will.'" But the court found that Jim had failed to show evidence that anyone had taken Gilbert's will to illegally suppress it past the expiration of the statute of repose. It sustained the objectors' motion for summary judgment and dismissed Jim's amended application because it was filed past the deadline in § 30-2408.

## ASSIGNMENT OF ERROR

Jim assigns that the district court erred in sustaining the objectors' motion for summary judgment.

## STANARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

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[1] *Thomas v. Board of Trustees*, 296 Neb. 726, 895 N.W.2d 692 (2017).

[2] *Id.*

[3] Statutory interpretation presents a question of law.[3]

[4] Appellate courts independently review questions of law decided by a lower court.[4]

## ANALYSIS

Jim posits three arguments as to why the court erred in denying the formal probate of Gilbert's will. First, he contends that § 30-2408's 3-year statute of limitations is not applicable because the initial probate proceeding had not been fully completed. Second, he contends that the will was deliberately suppressed by one of the heirs and that therefore equitable estoppel bars the application of the 3-year statute of limitations. Third, he contends the 3-year statute of limitations should be equitably tolled.

Section 30-2408 provides, in relevant part, the following:

> No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except . . . (4) an informal probate or appointment or a formal testacy or appointment proceeding may be commenced thereafter if no formal or informal proceeding for probate or proceeding concerning the succession or administration has occurred within the three-year period, but claims other than expenses of administration may not be presented against the estate. These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate.

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[3] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[4] *Id.*

District Court Did Not Err in Determining § 30-2408 Barred Admission of Gilbert's Will to Formal Probate

At common law, no definite time is prescribed within which a will is to be proved after the death of the testator, and the right to prove a will is not barred by the lapse of any time, however great.[5]

[5,6] Nonetheless, under the Uniform Probate Code, the general rule is that no appointment or testacy proceeding may be commenced more than 3 years after the death.[6] The statute of limitations is self-executing and ordinarily begins to run upon the decedent's death.[7]

The record is clear that Jim's 2015 application was a petition for formal testacy which was filed more than 3 years after Gilbert's death. The record is also clear that a prior proceeding for informal probate was pending at the time of Jim's 2015 application. The parties, however, disagree as to whether the prior proceeding for informal probate must have been fully completed or whether it was sufficient that it was merely commenced.

Jim contends that if a prior proceeding has been filed, that proceeding must have fully adjudicated the rights of the parties. In making that contention, he relies on the Nebraska comment to § 30-2408 which states that prior proceedings adjudicate finally the rights of the parties.[8] Therefore, Jim contends that such prior proceedings must be fully completed to act as a bar to the exception in subsection (4) of § 30-2408.

The objectors contend that the prior proceeding must have been merely commenced. In making that contention, they rely upon § 3-106 of the Uniform Probate Code, which binds

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[5] 95 C.J.S. *Wills* § 559 (2011).

[6] 31 Am. Jur. 2d *Executors and Administrators* § 230 (2012).

[7] *Id.*

[8] See § 30-2408 (Reissue 1989) (statutory comment).

interested parties to orders of the court, after proper notice, in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be opened for administration.[9] The comment to § 3-106 sets forth that that language of § 3-106—coupled with the exceptions to the limitations provisions in § 3-108 of the Uniform Probate Code, from which § 30-2408 was derived, that permit proceedings to construe wills and to determine heirs of intestates to be commenced more than 3 years after death—clarifies the purpose of the draftsmen to offer a probate proceeding to aid the determination of rights of inheritance of estates that were not opened for administration within the time permitted by § 3-108.[10]

[7] In interpreting the various sections of the Nebraska Probate Code, this court may examine the comments to the code.[11] Upon reading the comments to § 30-2408, we find it is clear that the enactment of § 30-2408 was intended to establish a basic limitation period of 3 years within which it may be determined whether a decedent left a will and to commence administration of his estate.[12] Further, the comment to § 30-2408 regarding subsection (4) indicates that the time limitation is not applicable if no prior formal or informal probate proceeding has occurred.[13]

We held in *In re Estate of Nemetz*[14] that § 30-2408 "permits an informal appointment proceeding to be commenced more than 3 years after the decedent's death 'if no formal or informal proceeding for probate or proceeding concerning the succession or administration has occurred within the three-year period.'" However, in that case, since no prior probate proceeding had

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[9] Unif. Probate Code § 3-106, 8 (part II) U.L.A. 35 (2013).

[10] *Id*., comment.

[11] *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990).

[12] See § 30-2408 (Reissue 1989) (statutory comment).

[13] See *id*.

[14] *In re Estate of Nemetz*, 273 Neb. 918, 921, 735 N.W.2d 363, 367 (2007).

been commenced, we were not required to consider whether an informal proceeding had occurred.

In *In re Estate of Harris*,[15] the Montana Supreme Court also considered the effect of a will offered for probate more than 3 years after the decedent's death. Montana is a state that has adopted the Uniform Probate Code, and it has enacted legislation nearly identical to our § 30-2408. The Montana court found the admission of the late-offered will was not barred by the 3-year statute of limitations under the exception that no proceedings concerning succession or estate administration had occurred within the 3-year period of the decedent's death.[16] In doing so, the court noted that this exception was not applicable if "there has been any other proceeding regarding succession or estate administration during the three-year period."[17] Later, when applying the exception, the court noted that "[n]o other proceedings had been opened since [decedent's] death."[18]

[8,9] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[19] It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.[20]

The Legislature has not defined "occur"; thus, we look to the commonly understood, everyday definition of the word. According to Black's Law Dictionary, "occur" means "[t]o happen; to meet one's eye; to be found or met with; to present

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[15] *In re Estate of Harris*, 379 Mont. 474, 352 P.3d 20 (2015).

[16] *Id.*

[17] *Id.* at 477, 352 P.3d at 23.

[18] *Id.* at 480, 352 P.3d at 25.

[19] *Clarke, supra* note 3.

[20] *State v. Beitel*, 296 Neb. 781, 895 N.W.2d 710 (2017).

itself; to appear; hence, to befall in due course; to take place; to arise."[21] The definitions in another dictionary are: "1: to be found or met with: appear 2: to come into existence: happen 3: to come to mind."[22]

The plain and ordinary reading of § 30-2408 indicates that a will may be probated only if no prior formal or informal proceeding for probate has occurred. The plain and ordinary reading of § 30-2408 does not indicate that the prior proceeding must have been completed. As a result, the district court did not err in determining that Jim's application to probate Gilbert's will was time barred.

### District Court Did Not Err in Determining That Jim Failed to Prove Elements of Equitable Estoppel

[10] Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations.[23]

[11] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.[24] As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped;

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[21] Black's Law Dictionary 1080 (6th ed. 1990).

[22] Merriam Webster's Collegiate Dictionary 802 (10th ed. 2001).

[23] *Bryan M. v. Anne B.*, 292 Neb. 725, 874 N.W.2d 824 (2016).

[24] *Id.*

and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.[25]

The district court found that there was no evidence that anyone intentionally concealed the will from the family. More specifically, it found that there was no evidence presented to demonstrate the person or persons who sent the will to Joseph had any intention of illegally suppressing the will beyond the 3-year statute of limitations. As a result, the court found that Jim failed to meet his factual burden to show equitable estoppel.

The record before us indicates that Gilbert owned the two homes at the time of his death. It is undisputed that all of the parties had access to his homes before and/or after his death and that each of the children, with the assistance of others, searched the home for important documents, such as a will, deeds, or car titles.

All parties agree that Gilbert lacked an efficient filing system for his important documents. The evidence indicates that he had papers strewn about his home and that he often kept important documents in his vehicles.

Assuming, without deciding, that the 3-year statute of limitations can be equitably extended, Jim presented insufficient evidence to invoke the doctrine of equitable estoppel. No evidence was presented that the objectors committed any action which would have amounted to a false representation or concealment of the existence of Gilbert's will; that the objectors had any knowledge, actual or constructive, of the existence of Gilbert's will; or that the objectors had the intention, or at least the expectation, that the suppression of Gilbert's will would influence Jim.

[12] Jim's allegations of how the will was concealed and by whom are not sufficient to overcome the district court's finding of summary judgment. Conclusions based on guess,

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[25] *Id.*

speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.[26] As a result, the denial of Jim's claim of equitable estoppel was not error.

## District Court Did Not Err in Rejecting Jim's Argument of Equitable Tolling

[13-15] Jim also contends that the doctrine of equitable tolling should overcome the objectors' motion for summary judgment. The doctrine permits a court to excuse a party's failure to comply with the statute of limitations where, because of disability, irremediable lack of information, or other circumstance beyond his or her control, the plaintiff cannot be expected to file suit on time.[27] Unlike the doctrine of equitable estoppel, equitable tolling requires no fault on the part of the defendant.[28] Equitable tolling, however, does require due diligence on the part of the claimant.[29]

Jim is correct that we have considered the principle that a statute of limitations can be equitably tolled.[30] In these cases, we were confronted with situations in which the claimant alleged that it was enjoined from bringing a claim by another court or governmental entity.

In *Macke v. Jungels*,[31] we held that it would be inequitable to allow the statute of limitations to run on a claim for damages

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[26] *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016).

[27] *Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996).

[28] *Id.*

[29] *Id.*

[30] See *Macke v. Jungels*, 102 Neb. 123, 166 N.W. 191 (1918); *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 8 N.W.2d 545 (1943); and *Becton, Dickinson & Co. v. Nebraska Dept. of Rev.*, 276 Neb. 640, 756 N.W.2d 280 (2008).

[31] *Macke, supra* note 30.

during the pendency of an action enjoining the defendant from bringing suit on that claim.

In *Lincoln Joint Stock Land Bank v. Barnes*,[32] defendants in a mortgage foreclosure appealed a decree of foreclosure in favor of the plaintiff. The foreclosure was commenced June 7, 1928, and on December 17, 1930, the case was removed from the docket but remained pending with leave to reinstate pursuant to a federal court order restraining the plaintiff from proceeding further. The action was subsequently reinstated, and the defendants contended that the plaintiff was barred by the applicable statute of limitations. We concluded that the plaintiff having been restrained from proceeding further by a paramount authority, the period thereof should not be considered in computing the time for the statute of limitations to run and the plaintiff was not so barred.

In *National Bank of Commerce v. Ham*,[33] a bank filed an action against a defaulting borrower beyond the applicable statute of limitations. The bank argued that the statute of limitations had been tolled because the borrower had been subject to an automatic bankruptcy stay. We determined that equitable principles did not apply, because the bankruptcy code provided an extra 30 days to file an action if the claim expired before the automatic stay was lifted or the bankruptcy was dismissed. We found no inequity in requiring the bank to commence its action within 30 days following the termination or dismissal of the bankruptcy.

In *Brodine v. Blue Cross Blue Shield*,[34] an insured sued her insurance provider in federal court for benefits the provider had denied. While the federal case was pending, the 3-year statute of limitations in the contract expired. The federal action was ultimately dismissed by agreement of the parties.

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[32] *Barnes, supra* note 30.

[33] *National Bank of Commerce v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999).

[34] *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

After the federal case was dismissed, the insured sued the insurer in state court. We concluded that that the applicable limitations period was not tolled during the pendency of the federal action.

In the instant case, Jim commenced the running of the statute of limitations by bringing the application for informal intestacy proceedings. In doing so, he alleged that after diligent search, no will was found, despite indications that he was aware Gilbert had a will. Further, he brought the application within 1 week of Gilbert's death. It is difficult to believe that under the state of disarray of Gilbert's homes and his lack of a filing system, any diligent search could have been completed within 1 week of his death. The record also shows that the objectors did not complete their efforts to clean out the house until well after the initial probate proceeding was implemented. Nothing in the record indicates that Jim was prevented from completing a more diligent search or awaiting the passage of additional time before he commenced his initial probate proceedings. Further, Jim was not prevented from bringing his subsequent claim by any paramount governmental authority. As a result, Jim is not entitled to an equitable tolling of the 3-year statute of limitations.

## CONCLUSION

The trial court did not err by granting summary judgment in favor of the objectors.

Affirmed.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Salem Grain Company, Inc., appellant, v. Consolidated Grain and Barge Co. et al., appellees.

900 N.W.2d 909

Filed September 8, 2017. No. S-16-995.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Federal Acts: Vendor and Vendee.** Under the doctrine established by *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government.
4. **Constitutional Law: Federal Acts.** The doctrine established by *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), is based on both the First Amendment's petition clause and the statutory interpretation of federal antitrust laws.
5. **Vendor and Vendee.** The application of the doctrine established by *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), to claims under antitrust laws is ultimately based on the fact that antitrust laws, tailored as they are for the business world, are not at all appropriate for application in the political arena.
6. **Vendor and Vendee: Conspiracy.** There is no "conspiracy" exception to the doctrine established by *Eastern R. Conf. v. Noerr Motors*, 365

U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), when applied to claims under antitrust laws.

7. **Constitutional Law: Vendor and Vendee: Conspiracy.** The line to determine when the conspiracy exception applies is based not on whether a claim is antitrust in nature, but on which theory the application of the doctrine established by *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), is predicated on, either the First Amendment or the antitrust laws.
8. **Consumer Protection.** Neb. Rev. Stat. § 59-1602 (Reissue 2010) mirrors the language of 15 U.S.C. § 45(a)(1) (2012).
9. ____. Neb. Rev. Stat. § 59-1603 (Reissue 2010) is construed in accordance with 15 U.S.C. § 1 (2012).
10. **Consumer Protection: Intent.** The Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 59-1622 (Reissue 2010 & Cum. Supp. 2012), was intended to be an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies.
11. **Consumer Protection.** The Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 to 59-1622 (Reissue 2010 & Cum. Supp. 2012), is tailored for the business world, not for the political arena.
12. **Pleadings.** The doctrine established by *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), is an affirmative defense.
13. **Rules of the Supreme Court: Pleadings.** An affirmative defense may be asserted in a motion filed pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) when the defense appears on the face of the complaint.
14. **Appeal and Error.** In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.
15. **Rules of the Supreme Court: Pleadings: Notice.** The Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, but the touchstone is whether fair notice was provided.
16. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
17. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
18. **Actions: Aiding and Abetting.** A claim of aiding and abetting is that in addition to persons who actually participate in concerted wrongful

action, persons who aid, abet, or procure the commission thereof, are subject to a civil action therefor.

19. **Actions: Conspiracy: Aiding and Abetting: Liability.** Claims of civil conspiracy and aiding and abetting are essentially methods for imposing joint and several liability on all actors who committed a tortious act or any wrongful acts in furtherance thereof.
20. **Aiding and Abetting: Torts.** A claim of aiding and abetting requires the presence of an underlying tort.
21. **Conspiracy: Torts.** A "conspiracy" is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort. Without such underlying tort, there can be no claim for relief for a conspiracy to commit the tort.
22. **Conspiracy: Aiding and Abetting.** A statutory violation alone is insufficient to sustain a claim of civil conspiracy or aiding and abetting.

Appeal from the District Court for Richardson County: Daniel E. Bryan, Jr., Judge. Affirmed.

David A. Domina and Christian T. Williams, of Domina Law Group, P.C., L.L.O., for appellant.

Terry C. Dougherty, Audrey R. Svane, and Kari A.F. Scheer, of Woods & Aitken, L.L.P., for appellee Consolidated Grain and Barge Co.

Robert S. Keith and Alexis M. Wright, of Engles, Ketcham, Olson & Keith, P.C., for appellees Gary Jorn, Kevin Malone, and Beth Sickel.

Bonnie M. Boryca and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellees Becky Cromer, Ray Joy, Bart Keller, and Charles Radatz.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

Salem Grain Company, Inc. (Salem), appeals an order from the district court for Richardson County dismissing its

complaint with prejudice for failure to state a claim upon which relief could be granted. The court found that all appellees were entitled to immunity from Salem's claims under Nebraska's Consumer Protection Act[1] (NCPA) and the *Noerr-Pennington* doctrine[2] and that Salem's claims of conspiracy and aiding and abetting required an underlying tort to be actionable. Accordingly, the court ruled that any amendments to the pleading would be futile. We affirm.

## II. FACTS

Salem operates commercial grain warehouses and elevators and owns trading businesses throughout southeast Nebraska, including a location in Richardson County, Nebraska. Consolidated Grain and Barge Co. (CGB) also operates commercial grain warehouses. In 2012, CGB expressed an interest in expanding its operations to the Falls City, Nebraska, area, and it now owns and operates a commercial grain warehouse in Richardson County, which is in competition with Salem's Richardson County warehouse.

At the time of the alleged actions, the other appellees were involved with various organizations in Falls City: Becky Cromer was the executive director of the Falls City Economic Development and Growth Enterprise (EDGE), a private organization; Gary Jorn, Ray Joy, and Bart Keller were members of EDGE; Kevin Malone was a member of EDGE, the Falls City Community Redevelopment Authority (CRA), the Citizen Advisory Review Committee (CARB), and the Falls City Planning and Zoning Board; Charles Radatz was a member of EDGE and the CRA; and Beth Sickel was a member of

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[1] Neb. Rev. Stat. §§ 59-1601 to 59-1622 (Reissue 2010 & Cum. Supp. 2012).

[2] See *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

EDGE, the CRA, and the CARB. Each of these appellees were sued in their individual capacities.

The remaining defendants, "John Doe I-IV and Jane Doe I-IV," were members of EDGE, the CRA, or the CARB that may have participated in the alleged wrongful acts against Salem.

Salem filed a complaint alleging that each of the individual appellees engaged in a pattern of behavior—through a series of contracts, combinations, and conspiracies—with the intent to deprive it of information, an opportunity to be heard, and due process of law, which caused Salem financial damages. More specifically, it alleged that its damages were a result of the unfair increased competition that CGB brought to the region through the special privileges it received from Falls City and that the individual appellees aided and abetted in concealing from Salem and the community those benefits.

Salem asserts that the individual appellees' pattern of behavior included preventing legal notice of the following actions from being provided to Salem: the annexation of land into Falls City; the rezoning of said land for commercial use; the declaration of said land as blighted, which made it eligible for tax increment financing; the approval of tax increment financing and the issuance of at least one bond to assist CGB; and the procurement of state and federal grants to assist CGB. In doing so, Salem contended that the appellees violated Nebraska's Open Meetings Act[3] (NOMA) and the NCPA.

As a result of CGB's entry into the market at the end of 2012, Salem alleged an annual loss net profit of 10 to 20 cents per bushel for 2 million bushels per year of grain that it would have or did handle in 2013 through 2015. During that same period, Salem alleged an annual minimum loss of $150,000 in storage revenue.

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[3] Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 2008 & Supp. 2011).

CGB; Cromer, Joy, Keller, and Radatz; and Jorn, Malone, and Sickel separately moved to dismiss Salem's complaint, arguing that it had failed to state a claim upon which relief could be granted, under Neb. Ct. R. Pldg. § 6-1112(b)(6). CGB, Jorn, Malone, and Sickel also asserted that the appellees were entitled to immunity under the *Noerr-Pennington* doctrine.

The court ruled that Salem could not state any claim against the appellees pursuant to the NCPA, because the appellees were entitled to immunity under the *Noerr-Pennington* doctrine, and rejected Salem's claim that an exception to the doctrine applied, because the appellees acted unlawfully by violating the NOMA. The court also ruled that the conspiracy and aiding and abetting claims required an underlying tort to be viable. Therefore, the court dismissed the complaint with prejudice, essentially finding any amendment would be futile. Salem appealed.

## III. ASSIGNMENTS OF ERROR

Salem assigns, restated and reordered, that the court erred (1) in finding the appellees immune from suit, under the *Noerr-Pennington* doctrine or otherwise; (2) in finding that conspiracy and aiding and abetting claims are not independent claims upon which relief can be granted but, instead, require the allegation of an independent tort; (3) by sustaining appellees' § 6-1112(b)(6) motions to dismiss; (4) by denying leave to amend; and (5) by not sustaining Salem's jury demand.

## IV. STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[4]

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[4] *Zapata v. McHugh*, 296 Neb. 216, 893 N.W.2d 720 (2017).

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[5]

## V. ANALYSIS

Salem argues, summarized, that it and other grain warehouses in and around southeast Nebraska were injured by CGB's entry into the market in Richardson County, because CGB received special economic privileges. It claims that the special privileges provided to CGB were the result of the appellees' conspiracy to prevent the public, and Salem specifically, from having knowledge of the economic development activities that the city council of Falls City was providing. It further claims that the appellees participated in violations of the NOMA in order to obtain those special privileges.

As a result, it asserts that the conspiracy to provide CGB an unfair advantage in the marketplace by violating the NOMA was a violation of the NCPA under §§ 59-1602 and 59-1603, which damaged Salem and created a cause of action under § 59-1609. Further, it contends that the appellees' conspiracy to engage in wrongful conduct—by violating the NOMA, violating the NCPA, and withholding information—is sufficient to sustain claims of conspiracy and aiding and abetting. CGB argues that Salem's single factual allegation—that it expressed an interest in opening a grain warehouse in the Falls City area—cannot support any claims against it. Further, the appellees contend that, acting in their individual capacities, their actions were nothing more than petitioning the government to offer CGB incentives to open a location in Falls City to advance economic development in the community.

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[5] *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

### 1. Appellees Are Entitled to Immunity From Salem's NCPA Claims Under *Noerr-Pennington* Doctrine

#### (a) Parties' Contentions

Salem argues that the *Noerr-Pennington* doctrine is a narrow defense that applies only to antitrust claims and not to its claims under the NCPA. It argues that §§ 59-1602 and 59-1603 of the NCPA were modeled after the Federal Trade Commission Act[6] (FTCA), not the Sherman Act[7]; that the FTCA focuses on consumer rather than market protection; and that the FTCA is, therefore, broader than merely antitrust claims.

Further, it contends that if we do find that the *Noerr-Pennington* doctrine applies to its claims, we should adopt a "conspiracy" exception to the doctrine in which politicians or political entities are involved as conspirators with private actors. While the U.S. Supreme Court has specifically rejected such an exception to the *Noerr-Pennington* doctrine, Salem contends that the Supreme Court limited its holding to the Sherman Act. Accordingly, assuming that the doctrine applies outside the context of antitrust claims, Salem contends that the doctrine remains subject to the "conspiracy" exception for unlawful conduct in petitioning the government.

Appellees argue that the *Noerr-Pennington* doctrine entitles them to immunity from Salem's claims under two theories. First, to the extent that the *Noerr-Pennington* doctrine is limited to the Sherman Act, and extended to the FTCA, private citizens petitioning their government for favorable business conditions are entitled to immunity, because federal antitrust laws were tailored to regulate business, not political arenas. Further, they assert that the NCPA is statutorily required to be construed in accordance with similar federal antitrust laws. Second, the First Amendment right to petition

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[6] See 15 U.S.C. §§ 41 to 58 (2012).

[7] See 15 U.S.C. §§ 1 to 7 (2012).

the government, which the *Noerr-Pennington* doctrine is also based on, is not limited to the antitrust context.

Appellees also contend that there are no applicable exceptions to the *Noerr-Pennington* doctrine regarding Salem's claims. First, Jorn, Malone, and Sickel contend that the U.S. Supreme Court has rejected any "conspiracy" exception to antitrust claims. Second, all appellees argue that the "sham" exception does not apply.

Alternatively, some of the appellees argue that they are entitled to immunity under Nebraska's Political Subdivisions Tort Claims Act and the *Parker* doctrine.[8]

### (b) Principles of *Noerr-Pennington* Doctrine

We recently considered the *Noerr-Pennington* doctrine in *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*.[9] In that case, we determined that the plaintiff was not entitled to immunity from the defendant's counterclaims, regarding damages from the plaintiff's tortious interference claims and antitrust activities, because the *Noerr-Pennington* doctrine is an affirmative defense that the plaintiff had waived by failing to timely assert it. Our decision in *ACI Worldwide Corp.* required this court to examine the development of the *Noerr-Pennington* doctrine in its application to private individual's interactions with the judicial branch only.

However, the *Noerr-Pennington* doctrine's application to judicial proceedings came significantly later than its creation in the context of petitioning the legislative and executive branches.[10] Accordingly, we briefly examine the principles

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[8] See *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 2d 315 (1943).

[9] *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017).

[10] See *California Transport v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

relevant to the *Noerr-Pennington* doctrine's application to private citizens' actions of petitioning the government.

As we recognized in *ACI Worldwide Corp.*, the *Noerr-Pennington* doctrine developed as a result of two decisions by the U.S. Supreme Court: *Eastern R. Conf. v. Noerr Motors*,[11] and *Mine Workers v. Pennington*.[12] In *Noerr Motors*, a collective of truckers sued several railroad companies, alleging that the railroads had violated the Sherman Act through an advertising campaign which was designed to destroy the trucking industry by influencing legislators and governors to only enact laws harmful to the trucking industry and damage its public image. The Supreme Court held that the Sherman Act did not apply to a private citizen's conduct undertaken to influence government action, because the Sherman Act's intended purpose was to regulate business, not political activities.[13] This was true even if the conduct by which citizens attempted to influence governmental regulation was undertaken for the sole purpose of destroying competition, involved unethical business practices, or was specifically intended to hurt competitors.[14]

In *Pennington*, a coal company claimed antitrust violations against the trustees of a coal miners' union, alleging that it, along with large coal companies, had lobbied the Secretary of Labor to establish a minimum wage in a contract market that would drive small coal companies out of business. In both *Noerr Motors* and *Pennington*, the Supreme Court found the defendants immune from liability under the Sherman Act.

The Supreme Court explained in *Pennington* that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose" and expanded

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[11] *Noerr Motors, supra* note 2.

[12] *Pennington, supra* note 2.

[13] *Noerr Motors, supra* note 2.

[14] *Id.*

the application of *Noerr Motors* to lobbying efforts directed at executive agencies.[15]

Since *Noerr Motors* and *Pennington*, the Supreme Court has extended the doctrine to petitions before administrative agencies and courts.[16] Additionally, it has granted *Noerr-Pennington* immunity "to a wide range of activities in addition to traditional lobbying, including . . . sales and marketing efforts[] and court litigation."[17]

[3] In *Columbia v. Omni Outdoor Advertising, Inc.*,[18] the Supreme Court further refined *Noerr Motors* and *Pennington* to stand for the proposition that "[t]he federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government." In that case, the Supreme Court applied these principals to lobbying efforts directed at a municipal government.[19]

[4] The U.S. Supreme Court predicated its holding in *Noerr Motors* on the First Amendment's petition clause and its statutory interpretation of the Sherman Act.[20] It reasoned:

> In a representative democracy such as this, [the Legislative and Executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the

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[15] *Pennington, supra* note 2, 381 U.S. at 670.

[16] See *California Transport, supra* note 10. See, also, *Davric Maine Corp. v. Rancourt*, 216 F.3d 143 (1st Cir. 2000).

[17] *Doron Precision Systems, Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173, 189 (S.D.N.Y. 2006). See, also, *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

[18] *Omni Outdoor Advertising, Inc., supra* note 17, 499 U.S. at 379-80.

[19] *Id.*

[20] See *Cardtoons v. Major League Baseball Players Ass'n*, 208 F.3d 885 (10th Cir. 2000), citing *Noerr Motors, supra* note 2. See, also, *Omni Outdoor Advertising, Inc., supra* note 17.

> power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. [Additionally], and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.[21]

The Supreme Court later reconciled these two principles by explaining that its interpretation of the Sherman Act was "in the light of the First Amendment's Petition Clause."[22]

While the U.S. Supreme Court has only explicitly applied immunity under the *Noerr-Pennington* doctrine in the antitrust context, many states have adopted and applied the *Noerr-Pennington* doctrine to state antitrust claims,[23] as well as other

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[21] *Noerr Motors, supra* note 2, 365 U.S. at 137-38.

[22] *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 424, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990).

[23] See, *Blank v. Kirwan*, 39 Cal. 3d 311, 703 P.2d 58, 216 Cal. Rptr. 718 (1985); *Harrah's Vicksburg Corp. v. Pennebaker*, 812 So. 2d 163 (Miss. 2001) (state antitrust and tort claims alleging restraint of trade, civil conspiracy, and tortious interference); *Defino v. Civic Center Corp.*, 780 S.W.2d 665 (Mo. App. 1989) (state antitrust and tort claims); *Green Mountain Realty v. Fifth Estate Tower*, 161 N.H. 78, 13 A.3d 123 (2010) (claim asserted under New Hampshire's Consumer Protection Act); *Good Hope Hosp. v. Dept. of Health*, 174 N.C. App. 266, 620 S.E.2d 873 (2005) (state antitrust and tort claims); *Black Hills Jewelry Mfg. Co. v. Felco Jewel Ind.*, 336 N.W.2d 153 (S.D. 1983); *Anderson Development Co. v. Tobias*, 116 P.3d 323 (Utah 2005) (state antitrust and tort claims). See, also, *Astoria Entertainment, Inc. v. DeBartolo*, 12 So. 3d 956 (La. 2009) (generally applicable to state claims); *Kellar v. VonHoltum*, 568 N.W.2d 186 (Minn. App. 1997) (suggesting *Noerr-Pennington* might apply, under Minnesota law, beyond antitrust context); *Amer. Med. Transp. v. Curtis-Universal*, 154 Wis. 2d 135, 452 N.W.2d 575 (1990).

claims.[24] Many courts have reasoned that the *Noerr-Pennington* doctrine's reliance on the First Amendment's petition clause provides justification to extend such immunity to other claims, because "there is no reason that the constitutional protection of the right to petition should be less compelling in the context of claims that arise outside of the scope of antitrust laws."[25] In fact, in *ACI Worldwide Corp.*, we recognized the extension of the *Noerr-Pennington* doctrine to nonantitrust claims.[26]

Further, the *Noerr-Pennington* doctrine applies in state court and to state-law claims because it is grounded on First Amendment rights to petition the government.[27] The First Amendment to the U.S. Constitution guarantees "the right

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[24] See, *Ex Parte Simpson*, 36 So. 3d 15 (Ala. 2009) (state tort causes of action); *Gunderson v. University of Alaska, Fairbanks*, 902 P.2d 323 (Alaska 1995) (state contract claim); *Zeller v. Consolini,* 59 Conn. App. 545, 758 A.2d 376 (2000) (state tort claim for tortious interference with business relationship); *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 942 N.E.2d 544, 347 Ill. Dec. 341 (2010) (state claims), *reversed on other grounds* 2012 IL 111443, 962 N.E.2d 418, 356 Ill. Dec. 733 (2012); *Bond v. Cedar Rapids Television Co.*, 518 N.W.2d 352 (Iowa 1994) (state tort claim); *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411 (Ky. App. 2004) (state tort claims stemming from zoning decisions); *Arim v. General Motors Corp.*, 206 Mich. App. 178, 520 N.W.2d 695 (1994) (state tort claims); *Structure Bldg. Corp. v. Abella*, 377 N.J. Super. 467, 873 A.2d 601 (2005) (state tort claims); *Arts4All Ltd. v. Hancock*, 25 A.D.3d 453, 810 N.Y.S.2d 15 (2006) (state tort claim); *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743 (R.I. 2004) (common-law tort claims); *RRR Farms, Ltd. v. American Horse Protection*, 957 S.W.2d 121 (Tex. App. 1997) (state tort claims); *Titan America, LLC v. Riverton Inv. Corp.*, 264 Va. 292, 569 S.E.2d 57 (2002) (state claims for conspiracy and business torts); *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010) (noting *Noerr-Pennington* generally applied to state claims, but holding that doctrine did not apply in particular circumstances of this case).

[25] *Astoria Entertainment, Inc., supra* note 23, 12 So. 3d at 964. See, e.g., *Hufsmith v. Weaver*, 817 F.2d 455 (8th Cir. 1987); *We, Inc. v. City of Philadelphia*, 174 F.3d 322 (3d Cir. 1999); *Kellar, supra* note 23.

[26] *ACI Worldwide Corp., supra* note 9.

[27] *Harrah's Vicksburg Corp., supra* note 23.

of the people . . . to petition the Government for a redress of grievances."

[5] Nevertheless, in the context of antitrust laws, *Omni Outdoor Advertising, Inc.* reiterated that the U.S. Supreme Court's ultimate conclusion in *Noerr Motors* was based on the fact that "antitrust laws, 'tailored as they are for the business world, are not at all appropriate for application in the political arena.'"[28] Under this reasoning, federal and state courts have applied the *Noerr-Pennington* doctrine to FTCA cases,[29] state unfair trade practices acts,[30] and a state consumer protection act.[31] The extension of the doctrine to state laws in this context is based on state statutory requirements to construe state antitrust laws in accordance with their federal counterparts.[32]

In *Rodgers v. F.T.C.*,[33] the petitioner contended that opponents of an "initiative measure had combined 'in both vertical and horizontal agreements, to make price representations to the public that constituted unfair and deceptive trade practices'" under § 5 of the FTCA, codified at 15 U.S.C. § 45, as well as the Sherman Act. The Federal Trade Commission applied the *Noerr-Pennington* doctrine to the claims with the similar reasoning that "'[t]he proscriptions of Section 5 of the FTC[A], as we view them, like the proscriptions of the Sherman Act, are tailored for the business world, not for

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[28] *Omni Outdoor Advertising, Inc., supra* note 17, 499 U.S. at 380, citing *Noerr Motors, supra* note 2.

[29] See, *Rodgers v. F.T.C.*, 492 F.2d 228 (9th Cir. 1974); *Union Oil Company of California*, 138 F.T.C. 1 (2004).

[30] See, e.g., *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852 (5th Cir. 2000); *People ex rel. Gallegos v. Pacific Lumber*, 158 Cal. App. 4th 950, 70 Cal. Rptr. 3d 501 (2008). See, also, *Green Mountain Realty, supra* note 23.

[31] See, *Suburban Restoration Co., Inc. v. ACMAT Corp.*, 700 F.2d 98 (2d Cir. 1983); *Green Mountain Realty, supra* note 23.

[32] See *Green Mountain Realty, supra* note 23.

[33] *Rodgers, supra* note 29, 492 F.2d at 229.

the political arena.'"[34] The Ninth Circuit Court of Appeals affirmed the Federal Trade Commission's decision, because all parties interested in the outcome of an initiative measure had an "equal right to submit their arguments to the electorate at large."[35]

In *Green Mountain Realty v. Fifth Estate*,[36] the New Hampshire Supreme Court considered whether the *Noerr-Pennington* doctrine applied to claims brought under its consumer protection act. The court noted that New Hampshire's Consumer Protection Act was analogous to and statutorily required to be construed consistently with § 5(a)(1) of the FTCA, as amended, which states, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[37]

Just as the *Rodgers* court and the Federal Trade Commission held that the *Noerr-Pennington* doctrine applied to claims brought under the FTCA, the court in *Green Mountain Realty* held that the *Noerr-Pennington* doctrine applied to claims brought under New Hampshire's Consumer Protection Act. The court ruled that even conduct which is deemed to be an unfair or deceptive practice within the act would be immune if it occurred in a political setting. "'Fraudulent or deceptive conduct can be actionable under the [Consumer Protection Act] only if it occurs in a business setting involving the advertising or sale of a commodity or service as part of the day-to-day business of the defendant.'"[38] The court too recognized that "the proscriptions of the [FTCA], 'like the proscriptions

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[34] *Id.* at 230.

[35] *Id.* at 231.

[36] *Green Mountain Realty, supra* note 23.

[37] See *id*. See, also, 15 U.S.C. § 45.

[38] *Green Mountain Realty, supra* note 23, 161 N.H. at 87, 13 A.3d at 131, quoting *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 791 A.2d 990 (2002).

of the Sherman Act, are tailored for the business world, not for the political arena.'"[39]

[6] However, the *Noerr-Pennington* doctrine is not without its limitations. In *Omni Outdoor Advertising, Inc.*, the U.S. Supreme Court held that there was a "'sham' exception" to private individuals' petitioning for anticompetitive action from their government.[40] The "sham" exception involves attempts to influence public officials for the sole purpose of expense or delay.[41] Conversely, the Court has rejected any application of a "'conspiracy' exception" to the *Noerr-Pennington* doctrine specifically in the context of antitrust laws.[42]

In *Omni Outdoor Advertising, Inc.*, the defendant had argued for both a broad construction of the conspiracy exception, which applies whenever a public official and private citizen conspired to restrain trade, and a narrow construction, which applies only when the conspiracy is to accomplish action not in the public interest or by corrupt means.[43] The Court rejected both constructions of the exception to the *Noerr-Pennington* doctrine:

> "It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . . 'co-conspirators'" in *some* sense with the private party urging such action. . . . And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws.[44]

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[39] *Id.* at 86-87, 13 A.3d at 129, quoting *Rodgers, supra* note 29.

[40] *Omni Outdoor Advertising, Inc., supra* note 17, 499 U.S. at 380. Accord *ACI Worldwide Corp., supra* note 9.

[41] *Id.*

[42] *Id.*, 499 U.S. at 382.

[43] *Omni Outdoor Advertising, Inc., supra* note 17.

[44] *Id.*, 499 U.S. at 383 (emphasis in original) (citation omitted).

[7] Since *Omni Outdoor Advertising, Inc.*, courts have continued to reject a conspiracy exception to the *Noerr-Pennington* doctrine in the context of antitrust claims.[45] However, courts have applied the conspiracy exception to the doctrine when claims are based solely on the First Amendment's petition clause, not antitrust laws, because the First Amendment does not entitle individuals to absolute immunity for their speech.[46] As such, the line to determine when the conspiracy exception applies is based not on whether the claim is antitrust in nature, but on which theory the application of the *Noerr-Pennington* doctrine is predicated on, either the First Amendment or the antitrust laws.

(c) Salem's Claims Under NCPA

Salem alleges violations of §§ 59-1602 and 59-1603. Before examining these statutes, however, we note Neb. Rev. Stat. § 59-829 (Reissue 2010) provides that when "any provision of Chapter 59 is the same as or similar to the language of a federal antitrust law, the courts of this state in construing such sections or chapter shall follow the construction given to the federal law by the federal courts."

[8] Section 59-1602 states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful." We have stated that § 59-1602 mirrors the language of 15 U.S.C. § 45(a)(1).[47]

[9] Section 59-1603 provides that "[a]ny contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce shall be unlawful." In *State ex rel.*

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[45] See, e.g., *Coll v. First American Title Ins. Co.*, 642 F.3d 876 (10th Cir. 2011).

[46] See, e.g., *Cardtoons, supra* note 20; *Astoria Entertainment, Inc., supra* note 23; *Westborough Mall v. City of Cape Girardeau, MO.*, 693 F.2d 733 (8th Cir. 1982).

[47] *Moats v. Republican Party of Neb.*, 281 Neb. 411, 796 N.W.2d 584 (2011). See 15 U.S.C. § 45(a)(1).

*Douglas v. Associated Grocers*,[48] we construed § 59-1603 in accordance with the U.S. Supreme Court's interpretation of 15 U.S.C. § 1, and we stated that the NCPA is "the state version of the Sherman Antitrust Act."

[10,11] The NCPA is Nebraska's version of the Sherman Act, but it also encompasses portions of other federal antitrust laws, including the FTCA from which § 59-1602 is modeled. Further, the act was intended to be an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies.[49] Accordingly, just as previous courts have asserted that the proscriptions of the FTCA and the Sherman Act are tailored for the business world, not for the political arena, we find that proscriptions of the NCPA are tailored for the business world, not for the political arena. As a result, we hold that Salem's claim that appellees violated the NCPA is barred under the immunities extended by the *Noerr-Pennington* doctrine.

While Salem's allegations are of unlawful conduct in the political arena, its claimed harm is antitrust in nature under the NCPA. Accordingly, its theory of recovery is predicated not on the First Amendment but on the interpretation of antitrust laws. Therefore, based on *Omni Outdoor Advertising, Inc.*, there is not a viable exception for a conspiracy between the appellees and public officials, irrespective of any alleged corrupt or unlawful means which may have resulted in harm to Salem. As a result, the conspiracy exception to the *Noerr-Pennington* doctrine is not applicable to the appellees.

### (d) Appellees Sufficiently Raised *Noerr-Pennington* Doctrine

[12-14] As we stated above, we recently recognized that "the *Noerr-Pennington* defense is an affirmative

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[48] *State ex rel. Douglas v. Associated Grocers*, 214 Neb. 79, 83, 332 N.W.2d 690, 693 (1983).

[49] *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004).

defense."[50] An affirmative defense may be asserted in a motion filed pursuant to § 6-1112(b)(6) when the defense appears on the face of the complaint.[51] CGB, Jorn, Malone, and Sickel explicitly raised the doctrine in their motion to dismiss. Cromer, Joy, Keller, and Radatz, however, did not raise the defense. Nevertheless, the court applied immunity under the doctrine to all appellees. Salem did not assign error to the court's application of the *Noerr-Pennington* doctrine to Cromer, Joy, Keller, and Radatz. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.[52] We find no plain error here.

[15] The Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, but the touchstone is whether fair notice was provided.[53] Because Salem received fair notice that the *Noerr-Pennington* defense was being raised by CGB, Jorn, Malone, and Sickel, which were similarly situated to Cromer, Joy, Keller, and Radatz, Salem was not prejudiced by the latter's failure to assert the defense. Accordingly, the *Noerr-Pennington* doctrine was sufficiently raised regarding all appellees.

[16] Because we find that the appellees are immune from Salem's NCPA claims under the *Noerr-Pennington* doctrine, we need not address their remaining assertions of immunity from the NCPA claims. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[54]

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[50] *ACI Worldwide Corp., supra* note 9, 296 Neb. at 863, 896 N.W.2d at 188.

[51] *deNourie & Yost Homes v. Frost*, 295 Neb. 912, 893 N.W.2d 669 (2017).

[52] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[53] *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 885 N.W.2d 1 (2016).

[54] *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017).

### 2. Claims of Aiding and Abetting and Civil Conspiracy Require Underlying Tort to Be Actionable

Salem argues that the court erred in ruling that its claims of civil conspiracy and aiding and abetting required an underlying tort to be actionable. It argues that under our prior case law, only an underlying wrongful conduct was required, and that that statement of the law was inadvertently changed. Accordingly, Salem asserts that a party is liable for the damages resulting from any wrongful or tortious act that they encourage or assist in the performance of, even if that party itself did not commit any underlying wrongful acts. Essentially, it contends that the appellees are each liable for the city council's and their own alleged violations of the NCPA and the NOMA, and for otherwise withholding information from the public.

[17] A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.[55] A claim of civil conspiracy requires the plaintiff to establish that the defendants had an expressed or implied agreement to commit an unlawful or oppressive act that constitutes a tort against the plaintiff.[56]

[18,19] Similarly, a claim of aiding and abetting is that "'in addition to persons who actually participate in [concerted wrongful action], persons who aid, abet, or procure the commission thereof, are subject to a civil action therefor.'"[57] Both of these claims are essentially methods for imposing joint and several liability on all actors who committed a tortious act or any wrongful acts in furtherance thereof.[58]

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[55] *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015).

[56] *deNourie & Yost Homes, supra* note 51.

[57] *Bergman v. Anderson*, 226 Neb. 333, 338, 411 N.W.2d 336, 340 (1987).

[58] See, *Koster v. P & P Enters.*, 248 Neb. 759, 539 N.W.2d 274 (1995); *Bergman, supra* note 57. See, also, *Malone, supra* note 55.

[20] Salem argues that our decision in *Bergman v. Anderson*[59] establishes that there does not need to be an underlying actionable tort, or even wrong, to sustain an aiding and abetting claim. Instead, it contends our holding in *Bergman* was that acts of aiding, abetting, and procuring the commission of wrongful conduct that causes damages are themselves the actionable wrongful conduct, and, therefore, aiding and abetting is an independent tort. We cannot agree with this interpretation. Instead, we held in *Bergman* that the plaintiff had "stated sufficient facts to support a theory that [the defendant] acted in concert with others and aided and abetted in the commission of an assault or battery [by] alleg[ing] that those attacking [the plaintiff] were under [the defendant's] 'direction.'"[60] Accordingly, the underlying conduct was the actionable tort of assault and battery.

[21,22] Further, our precedent is clear regarding claims of civil conspiracy: a "conspiracy" is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort.[61] Without such underlying tort, there can be no claim for relief for a conspiracy to commit the tort.[62] We reject Salem's assertion that a statutory violation alone is sufficient to sustain a claim of civil conspiracy or aiding and abetting.

Salem cites *Eicher v. Mid America Fin. Invest. Corp.*[63] to argue that unlawful conduct under the NCPA, and by inference the NOMA, could support its claims. In *Eicher*, we concluded that the appellants were guilty of civil conspiracy because they had committed fraudulent misrepresentation

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[59] *Bergman, supra* note 57.

[60] *Id.* at 339, 411 N.W.2d at 341.

[61] *Malone, supra* note 55.

[62] *Id.*

[63] *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

*and* violated the NCPA.[64] Accordingly, the conspiracy to commit the underlying tort, fraudulent misrepresentation, made each defendant in that case jointly and severally liable for all wrongful conduct committed in furtherance thereof, including violations of the NCPA.[65] Therefore, Salem's reliance upon *Eicher* is misplaced.

The only underlying conduct Salem asserts are violations of the NCPA and the NOMA. As stated above, such statutory violations alone are not sufficient to support claims of civil conspiracy or aiding and abetting. Therefore, we find that Salem failed to properly plead its claims of civil conspiracy or aiding and abetting.

### 3. Salem Failed to State Claim Upon Which Relief Could Be Granted

Salem's complaint alleges claims under the NCPA, aiding and abetting and civil conspiracy. As we have found, the appellees are entitled to immunity from Salem's NCPA claims. Further, Salem's claims of aiding and abetting and civil conspiracy require an underlying tort to be actionable and no such tort has been pled. Therefore, Salem has not stated claims upon which relief can be granted as a matter of law.

### 4. Salem's Remaining Assignments of Error Are Without Merit

In its reply brief, Salem conceded that "[i]f dismissal is appropriate and Arguments 1 - 3 are not successful, there is no amending to be done in this case."[66] Accordingly, we do not address its assignment of error to the contrary.

Additionally, because we find that Salem failed to state a claim upon which relief could be granted and Salem conceded

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[64] *Id.*

[65] *Id.*

[66] Reply brief for appellant at 17.

that leave to amend would be futile, we need not address Salem's assignment of error that the court failed to sustain its jury demand.

## VI. CONCLUSION

The *Noerr-Pennington* doctrine provides immunity to appellees for petitioning the government to take action, even if such resulting action violated the NCPA. Further, claims of civil conspiracy and aiding and abetting require an underlying tort, not merely an underlying statutory violation, to be actionable. Salem failed to state a claim upon which relief could be granted because appellees were entitled to immunity under the *Noerr-Pennington* doctrine, and it alleged only underlying statutory violations. Further, Salem conceded that any amendment to its petition would be futile. Therefore, we affirm the court's order dismissing Salem's complaint with prejudice.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Thomas A. Fitch, respondent.

900 N.W.2d 907

Filed September 8, 2017. No. S-16-1164.

Original action. Judgment of public reprimand.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Per Curiam.

## INTRODUCTION

This case is before the court on the conditional admission filed by Thomas A. Fitch, respondent, on June 7, 2017. The court accepts respondent's conditional admission and enters an order of public reprimand.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on April 29, 1992. At all relevant times, he was engaged in the practice of law in South Sioux City, Nebraska.

On June 6, 2017, the Counsel for Discipline of the Nebraska Supreme Court filed amended formal charges against respondent. The amended formal charges consist of one count against respondent arising from his conduct in connection with the business of his client in which respondent was a participant. The formal charges state that on September 26, 2007, Doug Peterson met with respondent at respondent's office to review and notarize documents with regard to Peterson's agreement

to purchase real property in Dixon County, Nebraska. An abandoned gravel pit was located on the property, and it was Peterson's intent to reopen the gravel pit as an ongoing sand and gravel mining operation. Prior to September 26, respondent had represented Peterson on several matters. During their September 26 meeting, Peterson informed respondent that he was looking for ways to finance his nascent sand and gravel business.

Following the meeting, respondent invested in Peterson's sand and gravel business, and brought in a longtime friend as an investor. On February 12, 2008, "Peterson Sand & Gravel, LLC" (LLC) was formed. Respondent prepared all documents for the formation of the LLC. Respondent was one of four members of the LLC.

Initially, Peterson was elected as the manager of the company to manage the daily affairs of the company. Peterson was elected as president of the LLC, and respondent was elected as the secretary and treasurer. Eventually, Peterson resigned as president of the LLC because of concerns that his prior personal bankruptcy and current financial status might jeopardize the LLC's ability to obtain a Small Business Administration loan. On March 21, 2009, all members of the LLC accepted the resignation of Peterson regarding his membership in the LLC and all offices he held. Peterson continued to serve as the daily operations manager of the LLC through December 2013.

Despite his previous resignation as president of the LLC, Peterson signed as president of the LLC in a series of six promissory notes and commercial debt modification agreements with a bank in South Sioux City. Respondent also signed each of the loan documents as secretary/treasurer of the LLC. At the time the loan documents were inaccurately signed by Peterson as president and by respondent as secretary/treasurer, respondent knew that Peterson no longer served as president of the LLC. However, respondent failed to inform the bank that Peterson was no longer president of the LLC.

The amended formal charges allege that by his omissions, respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence), 3-501.8 (conflict of interest), and 3-508.4 (misconduct).

On June 7, 2017, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313(B) of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney and professional conduct rules §§ 3-501.3, 3-501.8, and 3-508.4. In the conditional admission, respondent knowingly does not challenge or contest the truth of the matters conditionally asserted and waives all proceedings against him in exchange for a public reprimand.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's proposed discipline is appropriate and consistent with sanctions imposed in other disciplinary cases with similar acts of misconduct.

## ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or

> matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.3, 3-501.8, and 3-508.4 and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

## CONCLUSION

Respondent is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of public reprimand.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Jonathan J. Rivera, appellant.

901 N.W.2d 272

Filed September 15, 2017. No. S-16-255.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
3. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
4. ____: ____. For the protections of the Fourth Amendment to apply, a seizure must have occurred.
5. ____: ____. A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
6. **Police Officers and Sheriffs: Search and Seizure.** A police officer may make a seizure by a show of authority and without the use of physical force.
7. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** There is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. Thus, a seizure requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's show of authority.

8. **Witnesses: Evidence: Appeal and Error.** In reviewing a trial court's factual findings for clear error, an appellate court does not pass on the credibility of witnesses or reweigh the evidence presented.
9. **Police Officers and Sheriffs: Search and Seizure: Intent.** A law enforcement officer's subjective intent is irrelevant for determining whether a seizure did in fact occur.
10. **Police Officers and Sheriffs: Search and Seizure: Motor Vehicles.** A seizure does not occur simply because a law enforcement officer approaches an individual who voluntarily stopped his or her vehicle.
11. **Judgments: Appeal and Error.** A correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Riedmann and Bishop, Judges, on appeal thereto from the District Court for Lancaster County, Andrew R. Jacobsen, Judge, on appeal thereto from the County Court for Lancaster County, Thomas W. Fox, Judge. Judgment of Court of Appeals affirmed.

Mark E. Rappl for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

## INTRODUCTION

The county court overruled Jonathan J. Rivera's motion to suppress. In doing so, it applied the community caretaking exception to the Fourth Amendment.[1] On further review, we conclude that the initial police-citizen encounter did not amount to a seizure. Because the encounter began without a seizure, it was not necessary to invoke the community caretaking exception. We affirm the decision of the Nebraska Court of Appeals, albeit on different grounds.

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[1] See *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007).

## BACKGROUND

### Police-Citizen Encounter

We first describe the scene of the encounter. At approximately 10:35 p.m. on May 24, 2014, two patrolling Nebraska Game and Parks Commission conservation officers came across two groups of people on opposite sides of a paved road. According to all of the testimony, the scene was very dark at the time. The road was within the Branched Oak Lake recreation area and had no lane markings but had grassy areas to each side.

Before Rivera arrived, the officers parked their marked patrol vehicle on the right side of the road and exited the vehicle to investigate. When one of the officers approached the groups, the other officer returned to the patrol vehicle to call dispatch.

While sitting inside the patrol vehicle, the officer noticed another vehicle, driven by Rivera, approach and stop behind the patrol vehicle. The vehicle then pulled off the road onto the grassy shoulder to the right of the patrol vehicle and advanced along the shoulder at a slow speed. According to both officers at the scene, if the vehicle had attempted to pass the patrol vehicle on the left, the vehicle would still have left the paved portion of the road.

Concerned because the vehicle was approaching the group on the side of the road, the officer exited and walked around the front of the patrol vehicle toward Rivera's vehicle. The officer was wearing a uniform and displaying a badge, and he had a firearm on his person, though he did not draw or display it. Rivera saw the officer and stopped his vehicle as its front end was even with that of the patrol vehicle. At this time, the group of people on the side of the road was 15 to 20 feet away.

The officer approached and informed Rivera that he would move the patrol vehicle if Rivera would wait a few minutes. During this interaction, the officer noticed that Rivera had bloodshot, watery eyes and slurred speech. When asked

whether he had been drinking alcohol that evening, Rivera replied that he had. The officer then detained Rivera for a driving under the influence investigation which ultimately led to Rivera's arrest.

## Motion to Suppress

Before trial on his charge for driving under the influence, Rivera filed a motion to suppress evidence obtained as a result of the stop. The county court overruled the motion after finding that the arresting officer was operating in a community caretaking function when he made contact with Rivera. It later overruled Rivera's renewed motion to suppress at a bench trial and found Rivera guilty of driving under the influence. The county court revoked Rivera's driver's license for 18 months, imposed a $1,000 fine, sentenced him to 30 days' imprisonment and 24 months' probation, and ordered that he perform 20 hours of community service and pay all associated costs and fees.

## Appellate History

Rivera appealed to the district court and alleged that the county court erred in overruling his motion to suppress by concluding the arresting officer had reasonable grounds to detain him. The district court affirmed the judgment of the county court after concluding that it did not err in determining that the community caretaking exception applied to the police-citizen encounter.

On further appeal to the Court of Appeals, Rivera advanced the same argument and assigned that the district court erred in affirming the denial of his motion to suppress. In a split decision, the Court of Appeals affirmed the district court's ruling.[2]

We granted Rivera's petition for further review to address a perceived expansion of the community caretaking exception.

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[2] *State v. Rivera*, No. A-16-255, 2017 WL 977345 (Neb. App. Mar. 14, 2017) (selected for posting to court website).

## ASSIGNMENT OF ERROR

Rivera assigns that the Court of Appeals erred by applying the community caretaking exception to the Fourth Amendment in affirming the county court's order overruling his motion to suppress.

## STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[3] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[4] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[5]

## ANALYSIS

Rivera asserts that the Court of Appeals erred by finding the community caretaking exception applicable to the police-citizen encounter in question. He argues in his petition for further review that in doing so, the Court of Appeals "broadly expanded the community caretaking exception to unprecedented levels in direct contradiction to [the Nebraska Supreme] Court's explicit mandate that the community caretaking exception be narrowly and carefully applied in order to prevent its abuse."[6]

[3,4] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against

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[3] *State v. Rogers, ante* p. 265, 899 N.W.2d 626 (2017).

[4] *Id.*

[5] *Id.*

[6] Citing *State v. Bakewell, supra* note 1.

unreasonable searches and seizures.[7] But, for the protections of the Fourth Amendment to apply, a seizure must have occurred.[8] Therefore, we must first review the factual findings of the trial court for clear error and determine whether a seizure within the meaning of the Fourth Amendment actually occurred.

[5-7] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[9] A police officer may make a seizure by a show of authority and without the use of physical force.[10] However, there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.[11] Thus, a seizure requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's show of authority.[12]

It is apparent from the record that Rivera voluntarily stopped after seeing the uniformed officer approach the front of his vehicle. Regarding Rivera's stop, the trial court found:

> To ensure the safety of the group of people near the front of the patrol pickup, [the officer] then got out of his patrol pickup, walked around the front of the patrol pickup to the passenger front side, and toward [Rivera's] truck that was attempting to pass.
>
> [Rivera's] truck, which was attempting to pass on the passenger side of the patrol pickup, then stopped. [The officer] did not step out in front of [Rivera's] truck as it was attempting to pass.

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[7] *State v. Rogers, supra* note 3.

[8] See *State v. Avey*, 288 Neb. 233, 846 N.W.2d 662 (2014).

[9] *State v. Rogers, supra* note 3.

[10] *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[11] *Id.*

[12] *Id.*

> . . . At no time did [the officer] activate the emergency overhead lights or siren on the patrol pickup, nor did [the officer] honk the horn of the patrol pickup to get [Rivera] to stop his truck. [The officer] did not draw or display his gun. [Rivera's] truck was not blocked in by the patrol pickup and was able to keep driving forward if it avoided the people in the area.

[8] There was conflicting testimony as to whether the police officer raised his hand to indicate Rivera should stop. But the trial court did not make a specific finding as to whether the officer made such a gesture. Instead, its detailed account of the encounter suggests that the court implicitly found the officer did not make any gesture to direct Rivera to stop. At oral argument, Rivera asserted that the sentence in the court's analysis stating the officer "was operating in a community caretaking function when he made . . . contact with [Rivera] and caus[ed] [Rivera] to stop his truck" was a specific finding that Rivera was in fact stopped. To the contrary, we view that sentence as a conclusion of law, not as a finding of historical fact. In reviewing the county court's findings, we do not pass on the credibility of witnesses or reweigh the evidence presented.[13] There was no clear error in the county court's findings of historical fact.

[9,10] Though the officer admittedly intended to stop Rivera's vehicle, his subjective intent is irrelevant for determining whether a seizure did in fact occur.[14] The officer did not gesture at Rivera to stop or otherwise restrict his movement by blocking his vehicle. Therefore, we cannot say that a reasonable person would have believed that he or she was not free to leave. And, Rivera voluntarily stopped his vehicle; a seizure did not occur simply because the officer approached him and told him he would move his patrol vehicle in a

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[13] See *State v. Lee*, 290 Neb. 601, 861 N.W.2d 393 (2015).

[14] See *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

few minutes.[15] The interaction between the officer and Rivera began as a "first-tier" encounter.[16]

Based on the officer's observations of Rivera's bloodshot, watery eyes and slurred speech, the "first-tier" encounter promptly escalated to "second-tier."[17] The circumstances then clearly established reasonable suspicion that a crime was being committed. Accordingly, the detention that followed was constitutionally permitted.

[11] Because there was no seizure at the commencement of the encounter, there was no need to apply the community caretaking exception. We reiterate that the exception is to be "narrowly and carefully applied."[18] A correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result.[19] Although the county court unnecessarily resorted to the community caretaking exception, it correctly denied Rivera's motion to suppress. Likewise, the district court and Court of Appeals were correct in affirming the decision of the trial court, despite having followed it down the wrong path.

## CONCLUSION

Because no seizure occurred at the commencement of the encounter, it was not necessary to resort to the community caretaking exception. Although the lower courts began down the wrong path, they reached the correct result. Accordingly, we affirm the decision of the Court of Appeals.

Affirmed.

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[15] See, e.g., *State v. Hedgcock, supra* note 10.

[16] See *State v. Rogers, supra* note 3, 297 Neb. at 269, 899 N.W.2d at 631.

[17] See *id*.

[18] *State v. Bakewell, supra* note 1, 273 Neb. at 377, 730 N.W.2d at 338.

[19] *State v. Kolbjornsen*, 295 Neb. 231, 888 N.W.2d 153 (2016).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# William White, appellee and cross-appellant, v. Scott Busboom, appellant and cross-appellee.

901 N.W.2d 294

Filed September 15, 2017. No. S-16-377.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and give that party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Constitutional Law.** The determination of constitutional requirements presents a question of law.
5. **Motions to Dismiss: Immunity: Appeal and Error.** An appellate court reviews de novo whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party.
6. **Attorney Fees: Appeal and Error.** The award or denial of authorized attorney fees and the amount of a fee award are rulings that an appellate court reviews for abuse of discretion.
7. **Due Process.** Procedural due process claims require a two-step analysis: (1) whether the plaintiff has asserted a life, liberty, or property interest that is protected by the Due Process Clause and (2) whether the plaintiff was deprived of that interest without sufficient process.
8. **Public Officers and Employees: Employment Contracts.** An employment contract with a public employer can give rise to an objectively reasonable expectation of continued employment.

9. **Civil Rights: States.** The elements of, and defenses to, an action brought under 42 U.S.C. § 1983 (2012) are defined by federal law.
10. ____: ____. State courts are bound by definitive U.S. Supreme Court decisions or a consensus of federal court holdings on the substantive requirements of a claim or defense asserted under 42 U.S.C. § 1983 (2012).
11. **Public Officers and Employees: Immunity: Liability.** The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct, in the context of the specific facts at the time, does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
12. **Public Officers and Employees: Immunity.** Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.
13. ____: ____. Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law.
14. **Judgments: Immunity.** A qualified immunity inquiry has two components: (1) whether a plaintiff has alleged a deprivation of a federal statutory or constitutional right and (2) whether that right was clearly established at the time of the alleged violation. A court has discretion to determine which component to address first.
15. **Public Officers and Employees: Due Process.** Due process requirements for depriving public employees of a protected property interest in employment must be determined under the balancing factors set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
16. ____: ____. A plaintiff fails to state a viable procedural due process claim when adequate postdeprivation state procedures were available but the plaintiff failed to invoke them.
17. **Federal Acts: Attorney Fees.** In order to be eligible for attorney fees under 42 U.S.C. § 1988(b) (2012), a plaintiff must be a prevailing party, which means that the plaintiff must have obtained a judgment on the merits, a consent decree, or some other judicially enforceable settlement, which materially alters the legal relationship of the parties in a way that benefits the plaintiff.

Appeal from the District Court for Johnson County: Daniel E. Bryan, Jr., Judge. Reversed and remanded with instructions.

Douglas J. Peterson, Attorney General, James D. Smith, and Jessica M. Forch for appellant.

Abby Osborn, of Shiffermiller Law Office, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

The appellant, Scott Busboom, is an officer at the Tecumseh State Correctional Institution. The appellee, William White, is a former officer at the facility. White brought a civil rights action against the Department of Correctional Services (Department) and Busboom. He alleged that he was denied due process when he was placed on unpaid investigatory suspension without any opportunity to be heard. The district court granted the Department summary judgment, concluding that it was immune from suit under the doctrine of sovereign immunity. But it determined that Busboom was not entitled to qualified immunity in his individual capacity and that White was entitled to a judgment of liability against Busboom. The court concluded that Busboom had signed the letter suspending White while acting under the color of state law and that any reasonable officer in his position would have understood that White was entitled to a hearing before being deprived of a protected property interest.

We conclude that when White was suspended without pay, the law did not clearly establish that a public employer must first provide notice and an opportunity to respond to allegations of misconduct to an employee with a protected property interest in continued employment. As a result, we conclude that Busboom was entitled to qualified immunity. Additionally, we conclude that White has failed to show that he was deprived of due process because he did not receive a posttermination hearing. Accordingly, we reverse, and remand

with instructions for the court to enter summary judgment for Busboom and dismiss White's complaint.

## II. BACKGROUND

### 1. Underlying Events

White began working for the Department at the Tecumseh facility in 2008. A collective bargaining agreement (CBA) governed the terms of his employment.

In April 2010, White was arrested and accused of unlawful intrusion. On April 26, White was charged with a Class III misdemeanor for unlawful intrusion because the alleged victim was over age 18.[1] The day after his arrest, White posted bail and called Busboom about the arrest. Busboom was a major at the facility, and his duties included reviewing documentation for disciplinary actions against the uniformed officers and making recommendations to the deputy warden.

Christopher Connelly, a captain at the facility, was assigned as the investigating officer for White's matter. On April 13, 2010, Connelly sent an email about White to Fred Britten, the warden at the Tecumseh facility, and Brian Gage, the deputy warden. Connelly informed them that White was charged with a misdemeanor offense of "Invasion of Privacy" but that the matter was still under investigation and that the Nebraska State Patrol had seized his computer. Connelly recommended White be suspended pending the outcome of the investigation.

Two hours later, Britten sent an email to the Department's director and other persons, including Busboom. Britten stated that he had discussed the matter with the deputy director and that a decision had been made to suspend White without pay pending an investigation into the circumstances of his arrest.

The same day, Busboom signed a letter placing White on unpaid investigatory suspension:

> The Department . . . is placing you on investigatory suspension without pay, pending an investigation by

[1] See Neb. Rev. Stat. § 28-311.08 (Reissue 2008).

> outside law enforcement. The Investigatory Suspension is in accordance with the current [CBA] section 10.3b.
>
> While you are on the Investigatory Suspension, you are expected to be available in order for the agency to contact you. . . .
>
> [Note: Article M.15.1, if applicable, permits the agency to place the employee on an unpaid suspension when employees are charged with a criminal offense that is directly related to the workplace and could reasonably be expected to result in a significant disruption of the workplace. For more details, see AR 112.06, Section III.B.3.b.3.]

Busboom later stated in an affidavit that he was told to inform White of his unpaid suspension, that he used a form letter, and that he did not make the decision to suspend White. In a deposition, Busboom also said that he signed the suspension letter only because he was the highest ranking official at the facility that day.

Section 10.3.b of the CBA, which was the cited authority in White's 2010 suspension letter, provides the following:

> **Investigatory Suspension or Reassignment:** When the Employer determines that an employee must be removed from a current work assignment pending the completion of an investigation by the Employer to determine if disciplinary action is warranted, the Employer may:
>
> a. reassign the employee . . . at their current rate of pay until the investigation is completed.
>
> b. suspend the employee from work without pay for alleged violations involving a report or statement supporting the allegation of gross misconduct/negligence, or for actions which have brought the agency into non-compliance with governing state or federal laws/regulations, *until the investigation is completed or until six work days have elapsed, whichever occurs first. In all other instances, except those outlined above and those described in 10.3.c, the suspension shall be with pay.* The

> investigation may continue after the suspended employee returns to a paid status. If the employee is found not to have committed the violations alleged, the employee will be granted pay, benefits, leave, and service credit for the period of suspension.
>
> c. in cases where the employee has been charged in court with a felony, which is directly related to the workplace or which has the potential for significant impact on, or disruption of, the workplace, the Employer may suspend the employee from work with or without pay until the charges are resolved.
>
> . . . .
>
> When the Employer has placed an employee on investigatory suspension, the Employer shall have thirty work days from the date of discovery of an infraction to initiate disciplinary action by serving a written notice of allegations on the employee except when the Employer is awaiting the results of an outside investigation. If no action is taken, disciplinary action is barred for that particular incident.

(Emphasis supplied.)

Section 10.9 of the CBA provides that "[i]n no case will an employee be charged with a disciplinary violation when the employee behavior it is based upon occurred more than one year prior to the initiation of the disciplinary process and has been known by the direct supervisor for more than one year."

White's 2010 suspension letter incorrectly referred to "Article M.15.1" of the CBA, which is irrelevant to this dispute. In its order, the court stated that the correct provision is article M.14.1, which, in relevant part, provides the following:

> When a Department . . . employee has been charged with a criminal offense *that is directly related to the workplace* which could reasonably be expected to result in a significant disruption of the workplace, the . . . Director, in consultation with the [Department's] Human Resources

> Administrator, may suspend the employee without pay until there is a trial court disposition of the criminal charges. A final disposition of the pending charges is not necessary prior to discipline, but may be considered by an arbitrator or hearing officer if a grievance is filed. The employee reserves the right to file a grievance on the Agency Director's decision to suspend.

(Emphasis supplied.)

On December 15, 2010, White filed a grievance regarding his unpaid suspension, but an arbitrator determined that it was not timely filed. On December 22, an officer reported to Connelly, Gage, Britten, and Busboom that White had called the facility to report that he had been charged with a third degree misdemeanor and was scheduled to go to court in January 2011. After a human resources assistant received this email, he asked Gage whether to continue White's suspension without pay or change it to suspension with pay. Gage responded that White's status with the Department had not changed.

Busboom testified that he never received any information that White had been charged with a felony offense. Busboom did not know of any actions that the Department took to investigate the charge against White or whether the charge was related to the workplace. The Department's only action was to have Connelly act as a liaison to the county attorney.

On March 28, 2011, the county attorney dismissed the charge against White without prejudice. But the Department did not reinstate him to his position. On March 30, Gage, the deputy warden, signed a new letter informing White that he was being placed on an unpaid investigatory suspension. Gage advised White that the Department was placing him on an "investigatory suspension without pay, pending an investigation for possible actions off the job which adversely affects the employee's performance and/or the employing agency's performance or function." Like the 2010 suspension letter, the 2011 suspension letter cited § 10.3 of the CBA as

authority for the suspension but did not set out any allegations of misconduct.

Busboom testified that White was placed on a new investigatory suspension so that the Department could perform an internal investigation. White testified that Busboom was the assigned investigator. White filed a timely grievance to the second suspension.

White was asked to come to the Tecumseh facility on May 5, 2011, to speak to the assigned investigator regarding his suspension. White did not attend. On June 2, the Department sent White a letter informing him that it was considering disciplinary action against him because he had failed to come in for questioning. The letter stated that he had violated three CBA provisions, which prohibited the following conduct: (1) violating or failing to comply with the CBA, state laws, executive orders, regulations, policies, or procedures; (2) failing or refusing to comply with a lawful order or proper assignment; and (3) acts or conduct that adversely affect the employee's or employer's performance. The only factual allegation was that White had failed to comply with the directive to meet with the assigned investigator. The letter stated that the Department's charges would be heard on June 14.

On June 14, 2011, a predisciplinary hearing was held without White's presence. White stated in an affidavit that he did not appear because he believed his efforts would be futile based on the Department's previous actions against him. On July 21, Britten wrote White that his employment was terminated as of that date because he failed to comply with the directive to meet with the investigator at the facility.

On August 26, 2011, an administrator with the state's employee relations division set aside White's second suspension because the Department had violated § 10.3 of the CBA in ordering it. It determined that the first suspension ended on March 28, 2011, and ordered the Department to pay White his wages and benefits from March 28, 2011, to his discharge date. The Department did not appeal that decision.

## 2. Procedural History

In his amended complaint, White named the State "through the NEBRASKA DEPARTMENT OF CORRECTIONS, and SCOTT BUSBOOM, Individually and in his official capacity." White alleged that he had a liberty interest in his good name and a property interest in his employment, which was taken from him without due process. He alleged that the Department and Busboom had violated his due process rights by terminating his employment and depriving him of an opportunity to work "based on the ruse of an investigation which never occurred." He alleged that in violation of his due process rights, he was denied any opportunity to be heard for over 1 year, causing him to suffer lost wages, past and future; emotional distress and humiliation; and damage to his personal and professional reputation. He sought damages, injunctive relief, and attorney fees.

The Department and Busboom moved to dismiss White's complaint for failing to state a cause of action. They alleged that Busboom was immune from suit under the doctrine of qualified immunity. The court sustained the motion to dismiss as to White's claim of reputational damage but overruled it as to his claim of a property interest in his employment. The Department and Busboom then filed an answer in which they alleged affirmative defenses, including immunity from suit. All parties then moved for summary judgment.

In its February 2015 order, the court dismissed the Department as a party under the doctrine of sovereign immunity. It also found that neither the Department nor Busboom had violated White's due process rights in terminating his employment in June 2011, because he had notice and an opportunity to be heard. But the court concluded that White had a protected property interest in his employment and that his first unpaid suspension from 2010 to 2011 violated both the CBA and state personnel rules. It determined that Busboom had signed the suspension order while acting under the color of state law and that any reasonable officer in his position would

have understood White was entitled to a hearing before being deprived of a protected property interest.

Factually, the court made the following determinations: (1) Busboom was involved in the disciplinary process and had been told to place White on an investigatory suspension; (2) the Department and Busboom learned on April 13, 2010, that White had been charged with misdemeanor invasion of privacy; (3) White was not charged with a felony; (4) Busboom admitted that no disciplinary actions were considered as a result of the April 2010 letter; (5) Busboom admitted that White was not suspended because of a criminal offense directly related to the workplace; and (6) Busboom admitted that after 6 days, § 10.3.b of the CBA required a paid suspension.

The Department and Busboom then moved the court to reconsider. They argued that White's claim against Busboom was barred because he failed to timely avail himself of the grievance procedures in article 4 of the CBA and that "[o]n this basis, Defendant Busboom is entitled to qualified immunity." The court denied the motion.

The court acknowledged that White had not filed a grievance until 8 months after his 2010 suspension took effect, which was determined to be untimely. It characterized the waiver cases relied upon by Busboom as decisions holding that a plaintiff had waived his due process right to a hearing by failing to request it. The court distinguished these cases because the employee had received some type of pretermination hearing. It concluded that those cases fell within the rule that a posttermination proceeding can correct any deficiencies in a pretermination proceeding. The court concluded that there was no postsuspension hearing that could have cured the failure to provide a presuspension hearing.

After a hearing, the court ordered Busboom to pay White $20,000 in lost wages and $15,000 in compensatory damages. White's attorney then applied for $25,901.27 in attorney fees and costs. The court reduced that request by half and

ordered Busboom to pay $12,731.25 in attorney fees and $438.77 in costs.

## III. ASSIGNMENTS OF ERROR

Busboom assigns that the court erred in failing to conclude that White had waived his due process claim, granting White summary judgment on his claim against Busboom in his individual capacity, and concluding that Busboom was not entitled to qualified immunity.

In White's cross-appeal, he assigns that the court erred in reducing the award of attorney fees.

## VI. STANDARD OF REVIEW

[1,2] We will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted and give that party the benefit of all reasonable inferences deducible from the evidence.[3]

[3,4] We independently review questions of law decided by a lower court,[4] and the determination of constitutional requirements presents a question of law.[5]

[5] We review de novo whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party.[6]

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[2] *Barnes v. American Standard Ins. Co. of Wis., ante* p. 331, 900 N.W.2d 22 (2017).

[3] *Id.*

[4] *Doe v. McCoy, ante* p. 321, 899 N.W.2d 899 (2017).

[5] *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017).

[6] *Holloway v. State*, 293 Neb. 12, 875 N.W.2d 435 (2016).

[6] The award or denial of authorized attorney fees and the amount of a fee award are rulings that we review for abuse of discretion.[7]

## V. ANALYSIS

[7,8] The Due Process Clause of the 14th Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[8] Procedural due process claims require a two-step analysis: (1) whether the plaintiff has asserted a life, liberty, or property interest that is protected by the Due Process Clause and (2) whether the plaintiff was deprived of that interest without sufficient process.[9] An employment contract with a public employer can give rise to an objectively reasonable expectation of continued employment.[10]

In the instant case, Busboom does not dispute that White had a protected property interest in his continued employment. Nonetheless, Busboom contends that under our holding in *Scott v. County of Richardson*,[11] White waived his procedural due process claim by failing to timely file a grievance after the 2010 suspension. Additionally, Busboom contends that under the U.S. Eighth Circuit Court of Appeals' precedent, White's failure to file a grievance under the CBA operates as a procedural bar to White's due process claim.

White responds that because the CBA's procedures did not comply with minimal due process requirements for an unpaid

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[7] See, *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017); *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013).

[8] U.S. Const. amend. XIV, § 1.

[9] See *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 997, 792 N.W.2d 484 (2011), *disapproved on other grounds, State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016).

[10] See, *Scott v. County of Richardson*, 280 Neb. 694, 789 N.W.2d 44 (2010); 63C Am. Jur. 2d *Public Officers and Employees* § 136 (2009).

[11] *Scott, supra* note 10.

suspension, his failure to grieve his suspension cannot operate as a waiver of his due process rights. He argues that under the U.S. Supreme Court's precedent, postdeprivation procedures cannot cure the Department's failure to provide required predeprivation procedures or a prompt postsuspension hearing. And he argues that *Scott* is factually distinguishable.

In determining whether the availability of postdeprivation procedures satisfies due process requirements, courts have focused on two U.S. Supreme Court decisions regarding due process requirements for depriving a state employee of a protected property interest in his or her employment. We first explain those decisions.

In *Cleveland Board of Education v. Loudermill*,[12] the U.S. Supreme Court considered what pretermination process must be given to a tenured public employee who can be discharged only for cause. The Court concluded that Ohio's statutes, which provided that civil servants could not be discharged except for specified conduct, created a property interest in continued employment. It rejected the argument that the statutory procedures for discharging an employee defined the property interest. It held that a state "'may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'"[13] The Court held that due process required "'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment"[14] and set out the following requirements for that hearing:

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due

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[12] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

[13] *Id.*, 470 U.S. at 541 (citations omitted).

[14] *Id.*, 470 U.S. at 542.

> process requirement. . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.[15]

The Court emphasized that even if the underlying facts are clear, an employee's only meaningful opportunity to persuade an employer that a discharge is unnecessary or inappropriate is likely to be before the discharge.[16]

Finally, the court explained that its holding rested in part on Ohio's statutes that provided for a full posttermination hearing. It concluded that "all the process that is due is provided by a pretermination opportunity to respond, *coupled with* posttermination administrative procedures as provided by the Ohio statute."[17] Accordingly, the "pretermination hearing need not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[18] As stated, the pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story.[19] The Court further stated that if the employer perceives a hazard in keeping an employee on the job, it can suspend the employee with pay.[20]

Several years later, in *Gilbert v. Homar*,[21] the Court held that due process did not require a predeprivation hearing

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[15] *Id.*, 470 U.S. at 546.

[16] See *Loudermill, supra* note 12.

[17] *Id.*, 470 U.S. at 547-48 (emphasis supplied).

[18] *Id.*, 470 U.S. at 545-46.

[19] *Loudermill, supra* note 12.

[20] *Id.*

[21] *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997).

before an employee charged with serious criminal offenses can be temporarily suspended without pay.

Richard Homar was a university police officer who was arrested in a drug raid while at a friend's house and charged with felony drug offenses. On the same day, the university suspended him without pay pending an investigation into the charges. The charges were dismissed a week later, but Homar remained on suspension. Almost 3 weeks after his arrest, two officials met with him so he could tell his side of the story, but they did not tell him that they had received a report that he made confessions on the day of his arrest. About a month after his arrest, the university informed him by letter that because he had confessed to associating with drug dealers and obtaining marijuana from one of them for his own use, it had demoted him to a groundskeeper position. The next day, Homar met with the university president. After allowing Homar to read the report and respond, the president sustained the demotion.

The Third Circuit concluded that Homar's unpaid suspension without notice and a presuspension hearing violated his due process rights. It relied on the Supreme Court's statement in *Loudermill* that the employer could suspend an employee with pay pending a pretermination hearing.

The Supreme Court assumed without deciding that due process protections extended to a disciplinary action "short of termination" against a tenured public employee.[22] But it stated that a paid suspension was not the only way to avoid a perceived hazard in leaving an employee on the job. The Court also recognized that on multiple occasions, it had "'rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property.'"[23]

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[22] See *id.*, 520 U.S. at 929.

[23] *Id.*, 520 U.S. at 930, citing *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

In determining what process was constitutionally due Homar, the Court balanced the three distinct factors set out in *Mathews v. Eldridge*[24]: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest . . . ." In applying these balancing factors, the Court stated that although Homar had a significant interest in his paycheck, the length and finality of a deprivation must be considered and that Homar had faced only a temporary suspension without pay: "So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all . . . ."[25]

The Court concluded that the university had a significant interest in Homar's immediate suspension to maintain public confidence in its police force, because he had been charged with serious crimes and occupied a position of high public trust and visibility. In that circumstance, the state is not required to pay an employee whose services are no longer useful because he has been charged with a felony. Finally, the charges supported the university's conclusion that reasonable grounds existed to suspend Homar without providing a presuspension hearing.

But the Supreme Court agreed that once the charges were dropped, the risk of an erroneous deprivation increased substantially. Because the lower courts had not addressed whether the university violated Homar's due process rights by failing to provide a sufficiently prompt postsuspension hearing, the Court remanded for consideration of that issue.

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[24] *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

[25] *Gilbert, supra* note 21, 520 U.S. at 932.

In *Scott*,[26] we held that deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate posttermination due process and that such measures can be provided by grievance procedures that have been agreed upon by the employer and the employee.

The plaintiff, James Scott, was a deputy sheriff who was placed on paid suspension for misconduct during an internal investigation. A week later, the chief deputy gave Scott a detailed report of the reasons for the suspension. A few days after that, Scott submitted to a polygraph test. The next day, the chief deputy discharged Scott after he refused to resign. At some point, Scott filed a grievance with the sheriff and appealed the sheriff's denial to the county board of commissioners. The board found just cause to terminate Scott's employment.

The district court overturned Scott's termination because the defendants had violated his predeprivation due process rights. It relied on *Martin v. Nebraska Dept. of Public Institutions*,[27] a Nebraska Court of Appeals decision holding that posttermination proceedings cannot cure a violation of a plaintiff's pretermination due process rights.

On appeal, we acknowledged that three federal courts of appeals had held that posttermination hearings will not normally cure a violation of pretermination due process rights.[28] But we agreed with the Eighth Circuit's decisions on this issue and held that "deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate posttermination due process."[29] We concluded that the grievance procedures under the labor agreement

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[26] *Scott, supra* note 10.

[27] See *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998), *overruled, Scott, supra* note 10.

[28] See *Cotnoir v. University of Maine Systems*, 35 F.3d 6 (1st Cir. 1994); *Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984); and *Schultz v. Baumgart*, 738 F.2d 231 (7th Cir. 1984).

[29] *Scott, supra* note 10, 280 Neb. at 703-04, 789 N.W.2d at 52.

"process provides employees with due process required under *Loudermill*."[30]

We emphasized that the chief deputy had given Scott the factual allegations that supported the suspension and had given him an opportunity to respond to them. We did not dispute that the pretermination procedures violated Scott's due process rights but concluded that "the violation . . . was cured by the extensive posttermination hearing."[31]

However, since our holding in *Scott*, the Eighth Circuit has moved away from its earlier position that posttermination grievance procedures can cure violations of pretermination due process requirements.

The U.S. Supreme Court has consistently held that exhaustion of administrative remedies is not a prerequisite to filing an action under 42 U.S.C. § 1983 (2012),[32] absent a federal statute requiring such exhaustion.[33] However, in *Keating v. Nebraska Public Power Dist.*,[34] a 2009 case involving a water dispute, the Eighth Circuit stated that it had recognized an exception to the general rule that exhaustion of state remedies prior to bringing a § 1983 claim is not required. The court stated that "'[u]nder federal law, a litigant asserting a deprivation of *procedural due process* must exhaust state remedies before such an allegation states a claim under § 1983.'"[35] The court held, however, that it is not necessary for a litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation*

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[30] *Id.* at 705, 789 N.W.2d at 53.

[31] See *id.* at 706, 789 N.W.2d at 53.

[32] See, *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988); *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).

[33] See, e.g., 42 U.S.C. § 1997e (Supp. III 2015).

[34] *Keating v. Nebraska Public Power Dist.*, 562 F.3d 923 (8th Cir. 2009).

[35] *Id.* at 929 (emphasis in original), quoting *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016 (8th Cir. 2000).

process. It cited a U.S. Supreme Court holding that "'where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.'"[36] The court further noted that it had previously held the "'availability of post-deprivation remedies is not a defense to the denial of procedural due process where predeprivation process is practicable.'"[37] Accordingly, the court ruled that the appellants' failure to exhaust postdeprivation remedies did not affect their entitlement to predeprivation process and that the district court should not have considered this failure in dismissing the claim.

In 2012, the Eighth Circuit extended this reasoning in a case involving an Iowa teacher's discharge:

> [W]e have held that a government employee who chooses not to pursue available post-termination remedies cannot later claim, via a § 1983 suit in federal court, that he was denied post-termination due process. . . . That said, we have also held that "it is not necessary for a litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process." . . . Thus, the effect of a government employee's failure to pursue available post-termination remedies depends on whether the employee alleges the deprivation of pre-termination process or post-termination process.[38]

The appellate court concluded that based on the plaintiff's failure to pursue posttermination process, the federal district court had properly dismissed his claims of deficient posttermination proceedings. However, the appellate court determined

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[36] *Id.*, quoting *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990).

[37] *Id.*, quoting *Westborough Mall, Inc. v. City of Cape Girardeau*, 794 F.2d 330 (8th Cir. 1986).

[38] *Christiansen v. West Branch Community School Dist.*, 674 F.3d 927, 935-36 (8th Cir. 2012) (emphasis in original).

that his failure to exercise posttermination process had no effect on his claim that he was denied pretermination due process rights. As a result, the Eighth Circuit has implicitly acknowledged that where the Constitution demands predeprivation due process,[39] postdeprivation proceedings will not cure a state's failure to provide the minimum predeprivation process.

Importantly, the Eighth Circuit's 2012 decision is consistent with other federal court decisions addressing this issue in cases involving the discharge of a public employee with a protected property interest in employment.[40] Together, these decisions represent the consensus of lower federal appellate courts. Moreover, in *Loudermill* itself, the U.S. Supreme Court held that Ohio state employees were entitled to pretermination process despite the availability of extensive posttermination grievance procedures.[41] *Loudermill*'s minimum pretermination procedures are required even when posttermination grievance procedures are available.

[9,10] The elements of, and defenses to, a § 1983 action are defined by federal law.[42] State courts are bound by definitive U.S. Supreme Court decisions or a consensus of federal court holdings on the substantive requirements of a § 1983 claim or defense.[43] And the consensus of federal court holdings on this

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[39] See *Zinermon, supra* note 36.

[40] See, *Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014); *Carmody v. Board of Trustees of Uni. of Illinois*, 747 F.3d 470 (7th Cir. 2014); *Walls v. Central Contra Costa Transit Authority*, 653 F.3d 963 (9th Cir. 2011); *Montgomery v. City of Ardmore*, 365 F.3d 926 (10th Cir. 2004); *Ciambriello v. County of Nassau*, 292 F.3d 307 (2d Cir. 2002).

[41] See *Loudermill, supra* note 12.

[42] *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990).

[43] See, *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011); *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); *Howlett, supra* note 42; *Felder, supra* note 32; *Booker v. South Carolina Dept. of Corrections*, 855 F.3d 533 (4th Cir. 2017); *De La Rosa v. White*, 852 F.3d 740 (8th Cir. 2017); *Mammaro v. N.J. Div. of Child Prot. and Permanency*, 814 F.3d 164 (3d Cir. 2016).

issue is consistent with *Loudermill*. Upon the record before us, the Department did not provide White the minimum predeprivation due process required for a discharge under *Loudermill*, so we next consider whether that process clearly applied to White's claim that he was constructively discharged.

### 1. Court Erred in Determining That White's Predeprivation Due Process Rights Were Clearly Established

#### (a) Qualified Immunity Principles

[11,12] The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct, in the context of the specific facts at the time, does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[44] Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.[45]

[13] The U.S. Supreme Court has stated that it does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[46] "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'"[47]

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[44] See, *Messerschmidt v. Millender*, 565 U.S. 535, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012); *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled in part on other grounds, Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009); *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014) (quoting *Ashcroft, supra* note 43).

[45] *Carney, supra* note 44.

[46] *Ashcroft, supra* note 43, 563 U.S. at 741.

[47] *Id.*, 563 U.S. at 743. Accord, *Messerschmidt, supra* note 44; *Potter v. Board of Regents*, 287 Neb. 732, 844 N.W.2d 741 (2014) (citing *Messerschmidt, supra* note 44).

[14] A qualified immunity inquiry has two components: (1) whether a plaintiff has alleged a deprivation of a federal statutory or constitutional right and (2) whether that right was clearly established at the time of the alleged violation.[48] A court has discretion to determine which component to address first.[49]

(b) Law Has Not Clearly Established Employee's Due Process Rights for Constructive Discharge

Although White was not actually discharged until after the second suspension, he argues that Busboom's actions amounted to a constructive discharge. He contends that a procedural due process violation can rest on a constructive discharge. In support of this contention, White relies on an unpublished federal district court's judgment.[50]

In *Hammond v. Chester Upland School Dist.*,[51] the defendant school superintendent did not give the plaintiff school principal a reason for suspending her without pay until he was contacted by her attorney. The next month, the superintendent indicated that she would not be reinstated as principal and advertised her position as open. She refused the school board's offer of a teaching position, and the defendants did not offer her a hearing on her continued unpaid suspension until more than 5 months after its effective date and did not affirm the suspension until nearly 2 years later. The federal district court concluded that the suspension was a de facto termination and that she was entitled to pretermination due process under *Loudermill*, which had not occurred.

The Seventh Circuit has also recognized that sham investigative procedures, which deprive a tenured public employee

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[48] *Ashcroft, supra* note 43.

[49] See, *id.*; *Pearson, supra* note 44.

[50] See *Hammond v. Chester Upland School Dist.*, No. Civ. A. 13-6209, 2014 WL 4473726 (E.D. Pa. Sept. 9, 2014) (unpublished decision).

[51] *Id.*

of an adequate opportunity to respond to allegations of misconduct, coupled with an extensive suspension, can constitute a due process violation.[52]

But other courts have acknowledged the difficulty of extending the predeprivation requirements of *Loudermill* to a constructive discharge:

> A constructive discharge differs in essential ways from a true discharge. When an employer decides to fire an employee, there is no ambiguity about the loss that the employee will suffer. If the employee has a property interest in the job, the government employer must provide proper notice and a hearing before the firing is effected. . . . In the constructive-discharge context, however, the employer may not even know that its actions have compelled the employee to quit. When that is the case, the employer can hardly be required to provide notice or a hearing before the resignation . . . .[53]

The Fifth and the Ninth Circuits have similarly reasoned that in an actual discharge case, if an employer failed to provide minimum predeprivation due process, it clearly ignored those due process requirements, whereas an employer may not be on notice that it should provide predeprivation due process procedures in a constructive discharge case.[54]

Accordingly, the Fifth Circuit has held that a constructive discharge can support a viable § 1983 claim only if it amounted to a forced discharge to avoid providing pretermination hearing procedures.[55] The 10th Circuit requires a plaintiff employee to show that (1) the employer intentionally or knowingly created intolerable working conditions, or was at least on notice of those conditions; (2) such conditions compelled the

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[52] See *Levenstein v. Salafsky*, 164 F.3d 345 (7th Cir. 1998).

[53] *Lauck v. Campbell County*, 627 F.3d 805, 812 (10th Cir. 2010).

[54] See, *Fowler v. Carrollton Public Library*, 799 F.2d 976 (5th Cir. 1986); *Gravitt v. Brown*, 74 F. Appx. 700 (9th Cir. 2003).

[55] *Fowler, supra* note 54.

plaintiff's resignation; and (3) the employer failed to provide minimum pretermination procedures.[56]

[15] *Loudermill* and *Gilbert*[57] established that the due process requirements for depriving public employees of a protected property interest in employment must be determined under the *Mathews* balancing factors.[58] But we need not decide whether these facts show a constructive discharge or what due process requires in a constructive discharge case. It is enough here to conclude that White's due process rights in the context of a constructive discharge claim were not clearly established at the time that the Department placed White on an unpaid suspension. This is particularly true in light of our decision in *Scott*,[59] which implied that posttermination grievance procedures could provide all the due process that was required under *Loudermill*, even in cases involving an actual discharge.[60]

### (c) Law Has Not Clearly Established Employee's Predeprivation Due Process Rights for Unpaid Suspension

The holding in *Loudermill* was limited to setting out the minimum due process requirements before discharging an employee with a protected property interest in employment. As noted, in *Gilbert*, the Supreme Court did not decide whether procedural due process protections extend to adverse employment actions short of a discharge.[61] It held only that under the facts of the case, due process did *not* prohibit an unpaid suspension without predeprivation procedures.

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[56] *Lauck, supra* note 53.

[57] See *Loudermill, supra* note 12, and *Gilbert, supra* note 21.

[58] See *Mathews, supra* note 24.

[59] *Scott, supra* note 10.

[60] See *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

[61] See *Gilbert, supra* note 21.

In 2011, the Third Circuit applied the *Mathews* factors and held that absent extraordinary circumstances, due process requires notice and an informal hearing before suspending a state employee without pay if the employee has a protected property interest in employment, even if postsuspension grievance procedures are available. But the court also held that this right was not clearly established when the plaintiff was suspended.[62] Two other federal appellate courts have also held that a state employer must provide at least some type of predeprivation process before imposing an unpaid suspension.[63]

In contrast, the 10th Circuit held that a school board's placement of an administrator on unpaid leave without any type of hearing did not violate his due process rights.[64] Applying the *Mathews* factors, the court specifically held that the plaintiff was not constitutionally entitled to notice and opportunity to respond before he was suspended without pay. The court stated that his private interest in continuous income was attenuated by the relatively prompt postsuspension grievance procedure that was available to him, even though the administrator did not file a grievance. In effect, the court held that in unpaid suspension cases, an employee forfeits a predeprivation due process claim by failing to invoke postdeprivation procedures that were available. In a footnote, the Sixth Circuit stated that even if the administrator were entitled to a presuspension hearing, that right was not clearly established when the district suspended him.[65]

Given this conflicting federal case law and a statement by two federal appellate courts that the right to predeprivation notice and a hearing was not clearly established in unpaid

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[62] See *Schmidt v. Creedon*, 639 F.3d 587 (3d Cir. 2011).

[63] See, *O'Connor v. Pierson*, 426 F.3d 187 (2d Cir. 2005); *Baerwald v. City of Milwaukee*, 131 F.3d 681 (7th Cir. 1997).

[64] *Kirkland v. St. Vrain Valley Sch. Dist. No. RE-1J*, 464 F.3d 1182 (10th Cir. 2006).

[65] See *id.* at 1194 n.10.

suspension cases, we cannot say that Busboom should have known that White was entitled to notice and an informal hearing before he was suspended without pay. We conclude that the court erred in reasoning that any reasonable officer in Busboom's position should have understood that notice and an opportunity to be heard were required before the Department could deprive White of a protected property interest. That level of generality was too high to determine whether the unlawfulness of the suspension was apparent.[66] The question was whether, at the time of Busboom's actions, the law clearly established that White was entitled to notice and a predeprivation hearing to respond to the Department's allegations, despite the availability of prompt postdeprivation grievance procedures to challenge his unpaid suspension. We conclude that it did not. Accordingly, the court erred in failing to determine that Busboom was entitled to qualified immunity on White's claim that he was denied predeprivation due process.

### 2. White Has Failed to Show Postdeprivation Due Process Violation

White also contends that his failure to file a grievance within the allowable time did not waive his postdeprivation due process. More specifically, he alleges that the grievance procedures did not comply with due process requirements because the CBA failed to specify the time for a postsuspension hearing.

In support of this contention, he relies on the U.S. Supreme Court case of *Barry v. Barchi*,[67] in which the Court held that a horseracing board's suspension of a trainer was unconstitutional for the same failure. In *Barry*, the board suspended the trainer for 15 days after one of his horses tested positive for drugs. Under the applicable statute, it was presumed, subject to rebuttal, that the drug either was administered by the

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[66] See *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

[67] *Barry v. Barchi*, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979).

trainer or resulted from his negligence in failing to adequately protect against such occurrence. After the suspension, the trainer would be entitled to a hearing; however, the statute did not specify a time for such a hearing and granted the board up to 30 days after the hearing to issue a final order.

The trainer did not seek a hearing under the statute, but instead filed suit and challenged the law. The federal district court found that even a short suspension could irreparably damage a trainer's livelihood and that during that period, a trainer would lose clients to other trainers. It concluded that a full hearing after he had lost his clients was not a meaningful opportunity to be heard.[68] It ruled that the statute violated the trainer's due process rights because it allowed the sanction without a presuspension or a prompt postsuspension hearing.[69]

The Supreme Court agreed that the board was entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging.

Nonetheless, the Court noted that the statute, on its face and as applied, did not provide for a prompt hearing. So trainers would often not have an opportunity to test the state's evidence before they had suffered the full consequences of a suspension. The Court reasoned that this result did not satisfy the due process requirement of an opportunity to be heard on the ultimate determination "'at a meaningful time and in a meaningful manner.'"[70] Because the statute was deficient in that respect, the Court held that the trainer's suspension was constitutionally infirm under the Due Process Clause.

But *Barry* is distinguishable not only because the state procedures gave the trainer no opportunity to contest the sanction

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[68] *Id.*

[69] *Id.*

[70] *Id.*, 443 U.S. at 66.

until after it was completed, but because the sanction irreparably affected the trainer's future livelihood by causing him to lose clients.

In contrast, in *FDIC v. Mallen*,[71] the Supreme Court upheld the administrative postdeprivation procedures for a bank president to contest his suspension where the agency was required to hold a hearing within 30 days of a claimant's request and to issue a decision within 60 days of the hearing. The Court concluded that this 90-day period did not exceed permissible limits. It emphasized that leaving the suspension in place would not increase the plaintiff's reputational injury, because he had been indicted of a felony crime of dishonesty, and that the public interest in a correct decision counseled against requiring a hasty one. The Court stated that the indictment demonstrated that the suspension was not arbitrary and raised a public concern that the bank was not being managed responsibly.

In *Zinermon v. Burch*,[72] the U.S. Supreme Court explained that when a plaintiff in a § 1983 action alleges a procedural due process violation, the existence of state remedies is a relevant consideration:

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the

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[71] *FDIC v. Mallen*, 486 U.S. 230, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988).

[72] *Zinermon, supra* note 36, 494 U.S. at 125-26 (emphasis in original).

deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

[16] Consistent with *Zinermon*, lower federal appellate courts have concluded that a plaintiff fails to state a viable procedural due process claim when adequate postdeprivation state procedures were available but the plaintiff failed to invoke them.[73] We agree. These holdings are not an exception to the no exhaustion requirement.[74] Instead, a plaintiff cannot show a procedural due process violation if the governmental actor provided an adequate postdeprivation procedure and the plaintiff failed to invoke the remedy.[75]

The CBA in this matter permits an employee to file a grievance for a violation of the labor contract within 15 days of the contested action, unless the employer exercises its discretion to extend the time limit. The decisionmaker who took the action must confer with the employee and respond to the grievance within 10 days. If dissatisfied with the response, an employee can appeal to the agency head, who must respond within 15 days of the appeal. If instead, the agency head was the decisionmaker, he or she must respond to the grievance in 15 days. After that, an employee can appeal to the state's employee relations division, which must issue a decision within 20 days of a conference between the parties. An employee can appeal that decision to an arbitrator or hearing officer. And employees can additionally seek judicial review.[76]

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[73] See, e.g., *Raymond v. Bd. of Regents of the University of MN*, 847 F.3d 585 (8th Cir. 2017); *Christiansen, supra* note 38; *Kirkland, supra* note 64; *Alvin v. Suzuki*, 227 F.3d 107 (3d Cir. 2000); *Chiles v. Morgan*, No. 94-10980, 1995 WL 295931 (5th Cir. Apr. 26, 1995) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 53 F.3d 1281 (5th Cir. 1995)).

[74] See *Alvin, supra* note 73.

[75] *Id.*

[76] See *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009).

Here, the Department knew that White had been arrested for a misdemeanor offense of unlawful intrusion, not a felony offense. But regardless of whether the decision to suspend White without pay was correct, we conclude that under *Mallen*, the postdeprivation procedures available to White were constitutionally adequate. His failure to invoke them does not render his unpaid suspension an unlawful deprivation of a protected property interest without due process. We conclude that he has failed to show a postdeprivation due process violation.

### 3. White Is Not Entitled to Attorney Fees

[17] In order to be eligible for attorney fees under 42 U.S.C. § 1988(b) (2012), a plaintiff must be a prevailing party, which means that the plaintiff must have obtained a judgment on the merits, a consent decree, or some other judicially enforceable settlement, which materially alters the legal relationship of the parties in a way that benefits the plaintiff.[77] We have determined that Busboom was entitled to qualified immunity on White's claim that he was deprived of predeprivation due process and that White has failed to show a postdeprivation due process violation. Accordingly, White is not entitled to attorney fees, because he is not a prevailing party.

## VI. CONCLUSION

We conclude that the court erred in determining that any reasonable officer in Busboom's position should have understood that notice and an opportunity to be heard were required before the Department could deprive White of a protected property interest. Federal case law has not clearly established

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[77] See, *Lefemine v. Wideman*, 568 U.S. 1, 133 S. Ct. 9, 184 L. Ed. 2d 313 (2012); *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

that in unpaid suspension cases, a public employer must provide predeprivation notice and a hearing to an employee with a protected property interest in employment. Nor has federal case law clearly established that these due process rights are available in constructive discharge cases.

Moreover, when White was suspended, the controlling authority of both the Eighth Circuit and this court established that a state official's failure to provide pretermination due process could be cured by posttermination grievance procedures. A prison official in Busboom's position could have reasonably concluded that the same rule applied to the lesser disciplinary action of an unpaid suspension. Accordingly, the court erred in failing to sustain Busboom's qualified immunity defense.

Additionally, we conclude that White has failed to state a viable § 1983 claim that he was denied posttermination due process because he failed to invoke the grievance procedures that were available to him. Because White is not a prevailing party, he is not entitled to attorney fees. We therefore reverse the district court's judgment and remand the cause with instructions for it to enter summary judgment for Busboom and dismiss White's complaint.

Reversed and remanded with instructions.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Estate of Sheila Foxley Radford, deceased. Provident Trust Company et al., appellees, v. Mary Radford, appellant.

901 N.W.2d 261

Filed September 15, 2017. No. S-16-415.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
3. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Judgments: Records: Appeal and Error.** Meaningful appellate review requires a record that elucidates the factors contributing to the lower court's decision.
5. **Evidence: Records: Pleadings: Appeal and Error.** An appellate record typically contains the bill of exceptions, used to present factual evidence to an appellate court, and the transcript, used to present pleadings and orders of the case to the appellate court.
6. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
7. **Trial: Testimony: Evidence.** At a hearing, testimony must be under oath and documents must be admitted into evidence before being considered by the trial court.

8. **Trial: Stipulations: Judgments: Time.** While no particular form of stipulation is required when made orally in open court, except that it be noted in the minutes, its terms must be definite and certain in order to render the proper basis for a judicial decision.
9. **Pleadings: Evidence: Waiver.** Judicial admissions and stipulations constitute a substitute for evidence, thereby waiving or dispensing with the need to produce evidence by conceding for the purpose of litigation that a proposition of fact is true.
10. **Pleadings: Evidence.** Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.
11. **Pleadings: Intent.** An admission does not extend beyond the intendment of the admission as clearly disclosed by its context.
12. **Judicial Notice: Evidence.** Judicial notice of an adjudicative fact is a species of evidence.
13. **Judicial Notice: Records: Appeal and Error.** Papers requested to be judicially noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked, and made a part of the record. The trial court's ruling should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review of its decision is impossible.
14. **Judicial Notice: Rules of the Supreme Court: Evidence.** A court will take judicial notice of its own records. However, under Neb. Evid. R. 201(2), Neb. Rev. Stat. § 27-201(2) (Reissue 2016), judicially noticing its own proceedings and judgment is proper only where the same matters have already been considered and determined.
15. **Pleadings: Evidence: Records: Presumptions.** In the absence of a bill of exceptions, an appellate court presumes that any issue of fact raised by the pleadings received support from the evidence.
16. **Records: Pleadings: Appeal and Error.** When a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review.
17. **Pleadings: Proof.** Pleadings alone are not proof but mere allegations of what the parties expect the evidence to show.
18. **Pleadings: Trial: Evidence.** Pleadings and their attachments which are not properly admitted into evidence cannot be considered by the trial court.
19. **Records: Pleadings.** An application and its attachments are not evidence, and the allegations therein remain controverted facts until proved by evidence incorporated in the bill of exceptions.
20. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record,

an appellate court will affirm the lower court's decision regarding those errors.

21. **Records: New Trial: Appeal and Error.** When a record is deficient through no fault of the appellant, an appellate court will remand for a new trial if the deficiency in the record prevents the court from providing the appellant meaningful appellate review of the assignments of error.
22. **Evidence: Proof: Presumptions: Appeal and Error.** When, on appeal, an appellant argues that the evidence is insufficient on a point for which the appellee bore the burden of proof, an appellate court will not presume there was evidence before the lower court, when the filed bill of exceptions indicates that no evidence was offered.

Appeal from the County Court for Douglas County: Stephanie R. Hansen, Judge. Reversed and remanded for further proceedings.

Richard A. DeWitt and Steven G. Ranum, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellant.

Jeffrey J. Blumel and Kelsey M. Weiler, of Abrahams, Kaslow & Cassman, L.L.P., for appellee Brigid Radford.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

Mary Radford appeals from a county court order concerning the distribution of the Sheila Foxley Radford Trust (Trust). Applying Neb. Rev. Stat. § 30-2350 (Reissue 2016), the court ruled that a gift from Sheila Foxley Radford to Mary, which preceded the Trust's restatement but was acknowledged by Mary as an inheritance in a contemporaneous writing, was in satisfaction of Mary's inheritance from the Trust.

We find that the county court had insufficient evidence upon which it could base its findings. Accordingly, we reverse, and remand for a new hearing on the trustee's motion for direction.

## II. FACTS

In November 2015, Provident Trust Company, trustee for the Trust, filed an application for direction asking whether the doctrine of ademption by satisfaction applied to Sheila's gift to Mary, which it alleged Mary had contemporaneously acknowledged as an inheritance under § 30-2350. Attached to the application were copies of the Trust document, Sheila's will, and Mary's handwritten note.

The trustee set forth the following factual allegations in the application. On May 30, 2007, Mary signed a handwritten note stating: "This letter acknowledges that Sheila Radford, also known as 'mom', is affording me $200,000 for purchase of a home and is recognized by me as inheritance. I sign here recognizing that this is true." On June 11, Sheila wire-transferred $200,000 from her bank account to a title company, stating, "re: Mary Radford." Then, on April 6, 2010, Sheila updated her will and amended and restated the Trust. Sheila's will contained a "pour-over" provision for the Trust. The Trust's residuary was to be distributed among Sheila's four children upon her death: one-half to appellee, Brigid Radford, and one-sixth each to Mary, William Radford, and Christopher Radford. However, the Trust's restatement made no mention of the gift to Mary. Sheila passed away on October 5, 2014.

At hearings on the case, the trustee did not appear, but was represented by legal counsel. Mary appeared telephonically as a self-represented litigant. Neither party submitted any exhibits, no witnesses were sworn, nor was any testimony adduced. Instead, counsel asked the court "to take judicial notice of the record," to which the court responded that it would "take judicial notice of the record." Further, the trustee's counsel made several statements which summarized the issues presented by the application, relevant legal authority, and the facts. Counsel's statements included the following: On May 30, 2007, Mary signed a handwritten note "basically" stating: "Sheila Radford, also known as 'Mom,' is affording me $200,000 for purchase of a home and is recognized by me as

an inheritance. I sign here recognizing this as true." Counsel further stated, "There was a wire transfer. Money was given at that time. So, that actually happened." When discussing the issue of ademption by satisfaction, counsel stated that "if she'd already gotten that $200,000," then the court would "take it away." Counsel stated that 3 years later, the will and Trust were "done" and that Sheila's will contained a "pour-over" provision for the Trust. The Trust's residuary was to be distributed among Sheila's four children upon her death: one-half to Brigid, and one-sixth each to Mary, William, and Christopher.

After her statements, the trustee's attorney added, "I don't think there was any dispute as to the facts of the order of things or anything like that, right, Mary?" Mary replied, "No, there isn't." Mary then told the court about conversations with Sheila shortly before her death regarding Sheila's intent for the Trust's devises.

The court's order stated: "At the hearing, the court was advised that the facts are not in dispute and the sole issue is to resolve a question of law." Nevertheless, the order's statement of facts was more comprehensive than what counsel presented at the hearing and was buttressed by the facts contained in the application.

The court determined that § 30-2350 required it to consider Mary's contemporaneous writing acknowledgment and disregard parol evidence concerning the gift or its effect. Accordingly, the court ruled that the gift was an advancement of inheritance under § 30-2350 and reduced Mary's share of the residuary from the Trust accordingly. Under the court's decision, Mary was not entitled to any distribution from the Trust because a one-sixth share of the residuary was less than $200,000. Mary appealed.

## III. ASSIGNMENTS OF ERROR

Mary assigns, restated, that the court erred in (1) applying § 30-2350 to a trust, (2) finding that the doctrine of ademption by satisfaction—whether under the common law or

§ 30-2350—applies to a gift made before the execution of the trust instrument, (3) disregarding Sheila's intent to give Mary a one-sixth interest in the Trust—as expressed in the plain language of the trust instrument, and (4) determining that Mary's share of the Trust should be adeemed by the gift.

## IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[1]

[2,3] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.[2] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue.[3] When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[4]

## V. ANALYSIS

### 1. Insufficient Evidence Was Offered to Support Court's Findings

[4] Before assessing Mary's assignments of error, it is necessary to determine the scope of the evidence set forth in the record. Generally, meaningful appellate review requires a record that elucidates the factors contributing to the lower court's decision.[5]

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[1] *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

[2] *In re Robert L. McDowell Revocable Trust*, 296 Neb. 565, 894 N.W.2d 810 (2017).

[3] *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017).

[4] *Id.*

[5] *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013).

[5,6] An appellate record typically contains the bill of exceptions, used to present factual evidence to an appellate court, and the transcript, used to present pleadings and orders of the case to the appellate court.[6] A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[7]

[7] In the instant case, a bill of exceptions was prepared by the county court and was considered by us on appeal. The bill of exceptions shows that at the trial level, no exhibits were entered into evidence, nor did any witnesses testify under oath. We have previously recognized, in other matters, that at a hearing, "'testimony must be under oath and documents must be admitted into evidence before being considered'" by the trial court.[8]

However, the trial court's statement at the hearing, that it would "take judicial notice of the record," and its statement in its order, that it was "advised that the facts are not in dispute," suggest that the court relied on substitutes for exhibit evidence. Accordingly, we must consider whether the bill of exceptions elucidates any substitute evidence which contributed to the lower court's decision either through judicial notice or as a result of a stipulation or admission by the parties. Absent a complete bill of exceptions, we must determine whether the transcript is sufficient to support the court's judgment.

### (a) Parties Neither Stipulated to Nor Admitted Facts That Would Have Obviated Need for Evidence in This Case

[8] Neb. Ct. R. § 6-1404 permits parties to make informal oral stipulations in open court during trial without the

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[6] See *City of Lincoln v. Nebraska Pub. Power Dist.*, 9 Neb. App. 465, 614 N.W.2d 359 (2000).

[7] *In re Estate of Panec*, 291 Neb. 46, 864 N.W.2d 219 (2015).

[8] *Richards v. McClure*, 290 Neb. 124, 132, 858 N.W.2d 841, 848 (2015), quoting *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

requirement of reducing the stipulation to a writing signed by the parties or counsel for the parties. "While no particular form of stipulation is required when made orally in open court, except that it be noted in the minutes, its terms must be definite and certain in order to render the proper basis for a judicial decision."[9]

In regard to stipulations to factual issues, we have stated:

> "An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn—*i. e.* ceremonial or formal—or *judicial admission*, or *stipulation*. It is, in truth, a substitute for evidence, in that it does away with the need for evidence."[10]

[9-11] As recognized above, a judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.[11] Similar to a stipulation, judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.[12] Additionally, an admission does not

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[9] 73 Am. Jur. 2d *Stipulations* § 2 at 532 (2012), citing *All Star Const. Co., Inc. v. Koehn*, 741 N.W.2d 736 (S.D. 2007), and *State v. Parra*, 122 Wash. 2d 590, 859 P.2d 1231 (1993).

[10] *LeBarron v. City of Harvard*, 129 Neb. 460, 468-69, 262 N.W. 26, 31 (1935). See 9 John Henry Wigmore, Evidence in Trials at Common Law § 2588 (James H. Chadbourn rev. 4th ed. 1981). See, also, *Watkins v. Lake Charles Memorial Hosp.*, 144 So. 3d 944 (La. 2014).

[11] *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002); *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977).

[12] *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

extend beyond the intendment of the admission as clearly disclosed by its context.[13]

At the conclusion of the trustee's attorney's summary of the facts, issues, and law, she stated, "I don't think there was any dispute as to the facts of the order of things or anything like that, right, Mary?" Mary replied, "No, there isn't." While the parties may have agreed that there was no dispute as to the facts of the case, we cannot view the parties' act of agreeing that no dispute existed as a substitute for evidence.

Mary's response was not definite or clear as to what the facts in the case were. Though she agreed that the facts and the order of events in the case were not disputed, she did not say she agreed that counsel's statement of the facts was complete and accurate or that such statement of the facts should stand in lieu of evidence in the case. In fact, Mary attempted to provide additional facts to the court. Therefore, we do not read Mary's acknowledgment to be a stipulation that counsel's statement of the facts would act as a substitute for exhibit evidence or that she was making an admission as to the truth of such facts.

Further, counsel's statements themselves were not definite or clear on the facts in the case and the context suggests that it was not to be in lieu of actual evidence. Near the beginning of her statements, counsel requested the court to take judicial notice of the record taken. Before and after doing so, counsel requested the court to look at the various documents which she was discussing. Overall, the attorney's summation of the facts was brief and omitted important details alleged in the application. Accordingly, counsel's statements of the facts were neither clear nor definite. Instead, the context suggests that she intended the court to rely on documents judicially noticed, rather than her statements alone. Therefore, the statements by counsel and Mary set forth in the bill of exceptions did not

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[13] *Id.*

establish a substitute for evidence that obviated the need for actual evidence.

(b) No Evidence Was Incorporated Into Bill of Exceptions Through Judicial Notice

[12] Judicial notice of an adjudicative fact "'is a species of evidence.'"[14] Under Neb. Evid. R. 201(2), Neb. Rev. Stat. § 27-201(2) (Reissue 2016), a court may take judicial notice of adjudicative facts that are not subject to reasonable dispute, because they are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[15] When neither of the alternative tests is satisfied, judicial notice of an adjudicative fact is improper.[16]

[13] We have stated that care should be taken by a court to identify the fact it is noticing and its justification for doing so.[17] Specifically,

> "'[p]apers requested to be [judicially] noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. [The t]rial court's ruling . . . should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review [of its decision] is impossible.'"[18]

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[14] *Wolgamott v. Abramson*, 253 Neb. 350, 356, 570 N.W.2d 818, 823 (1997).

[15] See *id.* See, also, *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[16] *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990).

[17] *Strunk, supra* note 15.

[18] *Everson v. O'Kane*, 11 Neb. App. 74, 79, 643 N.W.2d 396, 401 (2002), quoting *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992). See, also, *Strunk, supra* note 15.

[14] Generally, a court will take judicial notice of its own records.[19] However, in *In re Interest of N.M. and J.M.*,[20] we recognized that "judicially notic[ing] 'its own proceedings and judgment [is proper only] where the same matters have already been considered and determined.'" There, on a motion to terminate parental rights, the court took judicial notice of exhibits from previous review hearings. However, during the previous hearings, one of the parents was without counsel. Further, the facts set forth in the exhibits were not information generally known within the jurisdiction or capable of being accurately and readily determined. Accordingly, we reasoned that the facts contained in such reports had not been considered and determined, but, instead, remained controverted. Therefore, we held that the court erred in taking judicial notice of the reports, despite being part of the court's record.[21] We note that *In re Interest of N.M. and J.M.* demonstrates why it is important that a court mark, identify, and make each document it notices part of the record so that we may review the admissibility of each noticed document.

In this matter, the court should have identified what it considered to be "the record" by individually marking and introducing into evidence each document that it considered relevant and competent. Since these steps were not taken, no evidence has been preserved in the record for appellate review.

### (c) Transcript Was Insufficient to Support Court's Judgment

[15,16] In the absence of a bill of exceptions, an appellate court presumes that any issue of fact raised by the pleadings

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[19] See *Rhodes v. Yates*, 210 Neb. 14, 312 N.W.2d 680 (1981).

[20] *In re Interest of N.M. and J.M.*, 240 Neb. 690, 699, 484 N.W.2d 77, 83 (1992) (emphasis omitted). See § 27-201(2) ("[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

[21] *Id.*

received support from the evidence.[22] When the transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review.[23]

In this matter, we do have a bill of exceptions to consider, which indicates that no evidence was adduced through the testimony of sworn witnesses or exhibits received. As a result, the only information available for review are the pleadings, the attachments to the pleadings, and the court's order.

[17-19] We have previously held that the pleadings alone are not proof but mere allegations of what the parties expect the evidence to show.[24] We have further held that pleadings and their attachments which were not properly admitted into evidence could not be considered by the trial court. An application is a form of pleading.[25] Therefore, an application and its attachments are not evidence, and the allegations therein remain controverted facts until proved by evidence incorporated in the bill of exceptions.

Again, in this matter, the court received no evidence which would have proved the allegations of the trustee's motion. As a result, the transcript before us is not sufficient to support the decision of the county court.

### 2. Matter Must Be Remanded for New Hearing

[20,21] As a general proposition, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[26] However, when a

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[22] *Stewart v. Heineman*, 296 Neb. 262, 892 N.W.2d 542 (2017).

[23] *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991).

[24] *Wilson v. Wilson*, 238 Neb. 219, 469 N.W.2d 750 (1991).

[25] See *Richards, supra* note 8.

[26] *Ginger Cove Common Area Co. v. Wiekhorst*, 296 Neb. 416, 893 N.W.2d 467 (2017).

record is deficient through no fault of the appellant, this general rule does not apply.[27] Instead, we will remand for a new trial if the deficiency in the record prevents us from providing the appellant meaningful appellate review of the assignments of error.[28]

[22] When, on appeal, an appellant argues that the evidence is insufficient on a point for which the appellee bore the burden of proof, we will not presume there was evidence before the lower court, when the filed bill of exceptions indicates that no evidence was offered.[29]

The trustee was the moving party. As a result, the trustee possessed the burden to provide sufficient evidence for the court to consider when determining the motion. The trustee's failure to elicit any evidence was through no fault of Mary. To affirm the lower court's decision based upon the lack of evidence in the record would be tantamount to rewarding the trustee for failing to meet its burden. Therefore, the matter must be remanded for a new hearing to allow evidence to be properly considered by the county court.

## VI. CONCLUSION

As a court of record, the county court erred in failing to create a record which contained the factors it relied on to reach its decision. As a result, upon our de novo review, we find that the county court had insufficient evidence upon which it could base its findings. Therefore, we reverse, and remand for a new hearing on the trustee's motion for direction.

Reversed and remanded for
further proceedings.

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[27] *Hynes, supra* note 5.

[28] *Id.*

[29] *Stewart, supra* note 22.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

# Wayne L. Ryan Revocable Trust et al., appellees, v. Constance "Connie" Ryan and Streck, Inc., appellees, and Timothy Coffey et al., all in their individual capacities and in their capacities as qualified beneficiaries of the Eileen Ryan Revocable Trust, appellants.

901 N.W.2d 671

Filed September 15, 2017. No. S-16-628.

1. **Interventions: Appeal and Error.** Whether a party has the right to intervene in a proceeding is a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Interventions: Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1315 (Reissue 2016) does not supersede Nebraska's final order jurisprudence regarding orders denying intervention.
4. ____: ____: ____. An order denying intervention is a final, appealable order.
5. **Interventions.** As a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 2016), the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
6. ____. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.
7. **Interventions: Pleadings.** Simply having a claim that arises out of the same facts as the claims at issue in the litigation does not constitute having a sufficient interest to support intervention.

8. ____: ____. A person seeking to intervene must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.
9. ____: ____. For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the complaint are true.
10. ____: ____. A prospective intervenor can raise his or her claims or defenses, but those claims or defenses must involve the same core issue as the claims between the existing parties. Intervenors can raise only issues that sustain or oppose the respective contentions of the original parties.
11. **Interventions.** An intervenor is bound by any determinations that were made before he or she intervened in the action. In other words, an intervenor must take the suit as he or she finds it.
12. ____. It is generally understood that the right to intervene does not carry with it the right to relitigate matters already determined, and an intervenor is admitted to the proceeding as it stands with respect to any pending issues.
13. **Appeal and Error.** An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Affirmed.

Paul Heimann, Bonnie M. Boryca, and Karen M. Keeler, of Erickson & Sederstrom, P.C., for appellants.

Thomas H. Dahlk and Victoria H. Buter, of Kutak Rock, L.L.P., and Ronald E. Reagan, of Reagan, Melton & Delaney, L.L.P., for appellee Streck, Inc.

Larry E. Welch, Jr., and Damien J. Wright, of Welch Law Firm, P.C., for appellee Constance "Connie" Ryan.

Heavican, C.J., Wright, Cassel, Stacy, and Funke, JJ.

Per Curiam.

This case involves an appeal from an order denying intervention in a corporate dissolution action. Because we find the intervenors are seeking only to relitigate matters

already decided by the court, we affirm the order denying intervention.

## FACTS

### 1. Parties

Streck, Inc., is a Nebraska corporation with its principal place of business in La Vista, Sarpy County, Nebraska. The company manufactures hematology, immunology, and molecular biology products for clinical and research laboratories.

Streck was founded by Dr. Wayne L. Ryan in 1971. Dr. Ryan is one of Streck's directors and is the sole beneficiary of the Wayne L. Ryan Revocable Trust (RRT), which owns 33 percent of Streck's voting stock and a majority of Streck's nonvoting stock. The sole trustee of the RRT is Dr. Ryan's daughter Carol Ryan. Dr. Ryan is also the primary beneficiary of his late wife's trust, the Eileen Ryan Revocable Trust (ERRT), which owns about 40 percent of Streck's nonvoting stock.

Another of Dr. Ryan's daughters, Constance Ryan (Connie), is the president and chief executive officer of Streck. Connie holds a majority of Streck's voting stock and about 8 percent of its nonvoting stock.

Stacy Ryan, one of the intervenors in this action, is also one of Dr. Ryan's daughters. Stacy redeemed her voting and nonvoting shares of Streck several years ago, but she remains an income beneficiary of the ERRT, which, as stated previously, owns nonvoting shares of Streck.

### 2. Lawsuit Between RRT and Streck

In October 2014, the RRT filed suit against Streck and Connie in the Sarpy County District Court. The suit alleged shareholder oppression under Neb. Rev. Stat. § 21-20,162 (Reissue 2012) and breach of fiduciary duty. The relief sought included, among other things, "the dissolution of Streck."

On January 19, 2015, Streck filed an "Election to Purchase" the RRT's shares pursuant to the provisions of Neb. Rev. Stat. § 21-20,166 (Reissue 2012). That statute allows a corporation involved in a judicial dissolution action brought by shareholders to elect to purchase the shares owned by the petitioning shareholders rather than dissolve.[1] If, within 60 days after filing the election, the parties reach agreement on the fair value of the shares, the court "shall enter an order directing the purchase of the petitioner's shares upon the terms and conditions agreed to by the parties."[2] If the parties are unable to reach an agreement, the court, "upon application of any party, shall stay such proceedings and determine the fair value of the petitioner's shares" as of the day before the date the election was filed or any other date the court deems appropriate.[3] After an election has been filed under this statute, the underlying dissolution action may not be "discontinued or settled, nor may the petitioning shareholder sell or otherwise dispose of his or her shares, unless the court determines that it would be equitable to the corporation and the shareholders, other than the petitioner, to permit such discontinuance, settlement, sale, or other disposition."[4]

Although not raised by the parties, we note for the sake of completeness that § 21-20,166 was repealed by the Legislature in 2014.[5] Originally, the repeal was to be operative in 2016, but the operative date was amended by 2015 Neb. Laws, L.B. 157, § 10, to January 1, 2017. The repeal was due to the Legislature's 2014 adoption of the Nebraska Model Business Corporation Act (NMBCA) and repeal of Nebraska's Business Corporation Act. The Legislature's intent in adopting the NMBCA was

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[1] § 21-20,166(1).

[2] § 21-20,166(3).

[3] § 21-20,166(4).

[4] § 21-20,166(2).

[5] 2014 Neb. Laws, L.B. 749, § 298.

to harmonize inconsistent terminology and move Nebraska to the same statutory scheme as 31 other jurisdictions.[6] The election provisions under the new NMBCA statute are substantially similar to the election provisions under the now-repealed § 21-20,166.[7] And, more important, the NMBCA contains a saving provision that expressly provides that the repeal of any statute by the NMBCA "does not affect" any "dissolution commenced under the statute before its repeal, and the . . . dissolution may be completed in accordance with the statute as if it had not been repealed."[8] As such, we conclude the repeal of § 21-20,166 does not materially affect our analysis.

On March 23, 2015, Streck filed an application to stay the proceedings, pursuant to § 21-20,166(4). In support of its motion, Streck alleged 60 days had elapsed and the parties had been unable to reach agreement regarding the fair value of the RRT's shares. Streck asked the court to stay further proceedings and determine the fair value of the RRT's shares as of October 29, 2014 (the day before the RRT's complaint was filed). On the same date, Connie filed a motion to determine fair value and stay further proceedings, which motion sought substantially the same relief as Streck's application.

On April 28, 2015, the court granted the applications and motions for stay. The court stayed the case to permit limited discovery on the issue of fair value and to allow the parties to reach possible agreement regarding the fair value of the shares.

### 3. Stacy's First Complaint in Intervention

On June 16, 2015, while the case was stayed, Stacy filed a complaint in intervention. She alleged that 3 years earlier,

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[6] Introducer's Statement of Intent, L.B. 749, Committee on Banking, Commerce, and Insurance, 103d Leg., 2d Sess. (Feb. 3, 2014).

[7] See Neb. Rev. Stat. § 21-2,201 (Cum. Supp. 2016).

[8] Neb. Rev. Stat. § 21-2,232 (Cum. Supp. 2016).

Streck and Connie had fraudulently induced her to redeem her voting and nonvoting shares of Streck for a purchase price that was substantially less than was legal and equitable. Although Stacy was not a shareholder of Streck at the time she filed her complaint in intervention, she asserted a variety of theories against both Streck and Connie, the details of which are not relevant to the issues on appeal.

On July 9, 2015, the court entered an order denying Stacy's complaint in intervention, finding that the claim she was asserting did not involve the same core issue as the claims between Streck and the RRT.[9] No appeal was taken from this order.

### 4. Cross-Motions for Partial Summary Judgment

On January 20, 2016, the RRT filed a motion for partial summary judgment, seeking an order that discounts should not be applied to the determination of the fair value of the RRT's shares. Shortly thereafter, Streck also filed a motion for partial summary judgment, seeking a determination that as a matter of law, it had validly exercised its election to purchase the RRT's shares, and that § 21-20,166(2) did not permit the RRT to challenge the election, because it authorized setting an election aside only if it was found not to be in the best interests of the corporation or the nonpetitioning shareholders.

On April 25, 2016, the court entered an order granting both parties' motions for partial summary judgment. With respect to the RRT's motion, the court held that discounts should not be applied to the determination of the fair value of the RRT's shares. With respect to Streck's motion, the court held that Streck was entitled to exercise an election to purchase the RRT's shares pursuant to § 21-20,166 and had validly done so. With the election declared valid, the only matter

[9] See *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

remaining for the court to consider was the determination of the "fair value" of the shares, subject to the election pursuant to § 21,20-166. Trial on that issue was scheduled to begin July 5.

### 5. Second Complaint in Intervention

On May 13, 2016—more than 1 year after Streck filed its election and several weeks after the district court granted summary judgment finding the election valid—Stacy filed a second complaint in intervention, joined by her adult children Timothy Coffey, Sean Coffey, and John Ryan Coffey (collectively the intervenors). The intervenors are 4 of the 16 Ryan family members who are income beneficiaries of the ERRT. They alleged a statutory right to intervene pursuant to Neb. Rev. Stat. § 25-328 (Reissue 2016).

The intervenors' complaint did not allege any issue with respect to the fair value of the RRT's shares. Instead, it addressed the issue of whether Streck's election to purchase the RRT's shares was valid. The intervenors alleged they had been prevented from "showing the Court that the election to purchase is not in the best interests of [the ERRT]" and wanted to show that Streck's special litigation committee "did not act independently, did not perform due diligence, and [was] not objective when making [its] decision to purchase" the RRT's shares. The intervenors alleged that "[t]he purchase of Dr. Ryan's Streck shares will dilute or diminish the value of the [ERRT's] shares and the [intervenors'] future interest in them." As such, they sought to intervene in order to ask that the court "alter, amend, or vacate" its earlier order granting summary judgment on the validity of the election and "stay adjudication of that issue" until after the intervenors had an opportunity to conduct full discovery and "be fully heard" on the validity of the election.

Streck and Connie each filed motions to strike the intervenors' complaint. They argued the intervenors did not have a

direct and legal interest in the matter being litigated, because (1) all that was left to decide was the fair value of the RRT's shares and (2) the remaining issue had no direct bearing on the intervenors, who were not Streck shareholders, but merely income beneficiaries of the ERRT, which held nonvoting Streck shares. They also argued that to the extent the intervenors were attempting to challenge issues previously determined involving the validity of Streck's election, their intervention was untimely, because summary judgment already had been granted on the issues and allowing intervention to challenge the summary judgment would impermissibly expand the proceedings. Finally, they argued that intervention would be futile because, under Nebraska law, one who intervenes has to take the case as they find it and the issues the intervenors wanted to challenge had already been decided on summary judgment.

On June 21, 2016, the court entered an order striking the complaint in intervention. The court stated its reasoning on the record, explaining that the intervenors had waited too long to intervene, had shown only an indirect interest in the subject matter of the litigation, and, in any event, were seeking relief the court could not grant. The intervenors timely appealed, and we moved the appeal to our docket.[10]

## II. ASSIGNMENTS OF ERROR

The intervenors assign, renumbered, that the district court erred in (1) ruling they did not have a direct and legal interest in the proceedings and striking the complaint in intervention on that basis, (2) ruling the complaint in intervention was untimely and striking it on that basis, and (3) ruling it could not fashion relief for the intervenors on the claims in their complaint in intervention and striking it on that basis.

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[10] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

## III. STANDARD OF REVIEW

[1] Whether a party has the right to intervene in a proceeding is a question of law.[11] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[12]

## IV. ANALYSIS

### 1. Jurisdiction

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[13] Streck argues we lack jurisdiction over this appeal, because the order denying intervention did not comply with the provisions of Neb. Rev. Stat. § 25-1315 (Reissue 2016).

[3,4] We recently addressed, and rejected, this same argument in *Streck, Inc. v. Ryan Family.*[14] There, we concluded that our jurisprudence regarding the finality of orders denying intervention[15] had not been superseded by § 25-1315, and we reiterated that an order denying intervention is a final, appealable order.[16] We conclude the intervenors have appealed from a final order, and Streck's argument to the contrary is without merit.

### 2. Statutory Intervention

#### (a) Legal Framework

The intervenors claim a right to intervene under § 25-328, which provides:

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[11] *Ruzicka v. Ruzicka, supra* note 9.

[12] *Id.*

[13] *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002).

[14] *Streck, Inc. v. Ryan Family, post* p. 773, 901 N.W.2d 284 (2017). Cf. *Guardian Tax Partners v. Skrupa Invest. Co.*, 295 Neb. 639, 889 N.W.2d 825 (2017).

[15] See, e.g., *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985).

[16] *Streck, Inc. v. Ryan Family, supra* note 14.

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

[5-9] As a prerequisite to intervention under § 25-328, the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.[17] An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.[18] Simply having a claim that arises out of the same facts as the claims at issue in the litigation does not constitute having a sufficient interest to support intervention.[19] Therefore, a person seeking to intervene must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.[20] For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the complaint are true.[21]

[10,11] Our jurisprudence also recognizes some practical limitations on the right to intervene. A prospective intervenor can raise his or her claims or defenses, but those claims

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[17] *Spear T Ranch v. Knaub*, 271 Neb. 578, 713 N.W.2d 489 (2006).

[18] *Id.*

[19] See *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959).

[20] *Spear T Ranch v. Knaub, supra* note 17.

[21] *Id.*

or defenses must involve the same core issue as the claims between the existing parties.[22] Intervenors can raise only issues that "sustain or oppose the respective contentions of the [original parties]."[23] The intervenor is bound by any determinations that were made before he or she intervened in the action.[24] In other words, "'[a]n interven[o]r must take the suit as he finds it . . . .'"[25]

(b) Intervenors' Complaint

[12] It is settled law that one who intervenes is bound by any determinations that were made before he or she intervened in the action.[26] In other words, "'[a]n interven[o]r must take the suit as he finds it . . . .'"[27] It is generally understood that the right to intervene does not carry with it the right to relitigate matters already determined,[28] and an intervenor is admitted to the proceeding as it stands with respect to any pending issues.[29]

At the time the intervenors filed their complaint, the only disputed issue remaining for determination by the court in this judicial dissolution was the fair value of the RRT's shares. The intervenors' complaint, however, makes no allegations regarding that issue. The allegations in the complaint instead

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[22] See *Ruzicka v. Ruzicka, supra* note 9.

[23] *State ex rel. Nelson v. Butler*, 145 Neb. 638, 650, 17 N.W.2d 683, 691 (1945).

[24] See *School Dist. of Gering v. Stannard*, 196 Neb. 367, 242 N.W.2d 889 (1976).

[25] *Drainage District v. Kirkpatrick-Pettis Co.*, 140 Neb. 530, 538, 300 N.W. 582, 587 (1941).

[26] *School Dist. of Gering v. Stannard, supra* note 24.

[27] *Drainage District v. Kirkpatrick-Pettis Co., supra* note 25, 140 Neb. at 538, 300 N.W. at 587.

[28] See, e.g., *Arizona v. California*, 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983).

[29] 59 Am. Jur. 2d *Parties* § 227 (2012).

challenge only the already-settled question of the validity of Streck's election. Because the intervenors are seeking to use intervention as a vehicle for relitigating issues previously determined by the court, the complaint in intervention was properly stricken.

[13] The intervenors argue on appeal that even if their interests do not support statutory intervention, the district court should have permitted them to intervene as a matter of equity. Independent of the intervention statutes, we have held that a court with equitable jurisdiction may allow persons to intervene as a matter of equity in a proper case.[30] But here, equitable intervention was neither alleged as a basis for the complaint in intervention nor clearly argued before the district court. An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.[31]

## V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

Miller-Lerman and Kelch, JJ., not participating.

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[30] See *Department of Banking v. Stenger*, 132 Neb. 576, 272 N.W. 403 (1937).

[31] *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Streck, Inc., a Nebraska corporation, appellee, v. Ryan Family, L.L.C., appellee, and Stacy Ryan, individually and derivatively on behalf of Ryan Family, L.L.C., appellant.

901 N.W.2d 284

Filed September 15, 2017. No. S-16-664.

1. **Interventions: Appeal and Error.** Whether a party has the right to intervene in a proceeding is a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Interventions: Final Orders: Appeal and Error.** An order denying intervention is a final order for purposes of appeal.
4. **Interventions: Final Orders.** Neb. Rev. Stat. § 25-1315 (Reissue 2016) does not modify Nebraska's final order jurisprudence as it regards orders denying intervention.
5. **Interventions.** As a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 2016), the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
6. ____. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right. Simply having a claim that arises out of the same facts as the claims at issue in the litigation does not constitute having a sufficient interest to support intervention.
7. **Interventions: Pleadings.** A person seeking to intervene must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.

8. ____: ____. For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the complaint are true.
9. ____: ____. A prospective intervenor can raise his or her claims or defenses, but those claims or defenses must involve the same core issue as the claims between the existing parties. Intervenors can raise only issues that sustain or oppose the respective contentions of the original parties.
10. **Interventions.** An intervenor is bound by any determinations that were made before he or she intervened in the action. In other words, an intervenor must take the suit as he or she finds it.
11. **Corporations: Contracts.** The Nebraska Uniform Limited Liability Company Act is a default statute; subject to certain enumerated exceptions, the act governs only when the operating agreement is silent.
12. ____: ____. Under the Nebraska Uniform Limited Liability Company Act, a member of a limited liability company is deemed to assent to the operating agreement.
13. **Corporations.** Under the Nebraska Uniform Limited Liability Company Act, in a manager-managed limited liability company, matters relating to the activities of the company are decided exclusively by the managers unless otherwise expressly provided in the act.
14. **Corporations: Actions: Interventions.** The fact that a member of a limited liability company might experience reduced distributions, depending on the outcome of a lawsuit against the company, does not give the member a direct and legal interest in the lawsuit sufficient to support intervention.
15. ____: ____: ____. For purposes of determining the right to intervene, a court generally treats actions by a member of a limited liability company in the same manner as actions by a shareholder of a corporation.
16. **Corporations: Actions: Parties.** As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.
17. **Corporations: Actions: Parties: Interventions.** When a corporation cannot or will not protect the interests of the stockholders, a stockholder may intervene in an action on behalf of the corporation for the shareholder's own protection. However, this is a very limited exception to the general rule that a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property.

18. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Affirmed.

Paul Heimann, Bonnie M. Boryca, and Karen M. Keeler, of Erickson & Sederstrom, P.C., for appellant.

John D. Stalnaker and Aimee K. Cizek, of Stalnaker, Becker & Buresh, P.C., for appellee Ryan Family, L.L.C.

Thomas H. Dahlk and Victoria H. Buter, of Kutak Rock, L.L.P., and Ronald E. Reagan, of Reagan, Melton & Delaney, L.L.P., for appellee Streck, Inc.

Heavican, C.J., Wright, Cassel, Stacy, and Funke, JJ.

Per Curiam.

In January 2016, Streck, Inc., filed a complaint against the Ryan Family, L.L.C. (L.L.C.), in the district court for Sarpy County. Streck's complaint alleged the L.L.C. breached a lease agreement containing an option to purchase real property and sought specific performance. The L.L.C. responded and defended the action. In June, a member of the L.L.C. moved to intervene in her own behalf and on behalf of the L.L.C. She appeals from the district court's order denying her motion. We affirm.

## I. FACTS

### 1. Parties

Streck is a Nebraska corporation with its principal place of business in La Vista, Sarpy County, Nebraska. The L.L.C. is a Nebraska limited liability company composed of six members of the Ryan family, including Stacy Ryan (Ryan). The L.L.C.'s only asset is real property located in La Vista, which

it leases to Streck, and the cash generated from the rental of that property.

### 2. Lease Agreement

The L.L.C. leased the property to Streck pursuant to an agreement dated December 1999 and subsequently amended. The lease gave Streck an option to purchase the property from the L.L.C. based on certain conditions. Streck claims it met the conditions and properly exercised the option. Based on the date Streck exercised the option, closing should have occurred no later than January 3, 2016. When no closing occurred, Streck filed suit against the L.L.C.

### 3. Lawsuit Between Streck and L.L.C.

Streck filed its complaint January 13, 2016, in the district court. It sought an order declaring the L.L.C. in breach of the lease and ordering specific performance of the option to purchase.

The L.L.C. operating agreement vests all management duties in a management board consisting of comanagers Wayne Ryan and Connie Ryan. After being served with the complaint, the comanagers of the L.L.C. filed an application for appointment of a receiver to represent the L.L.C., citing a conflict which they described as follows:

> Co-Manager Dr. Wayne Ryan believes the [L.L.C.] must oppose Streck's Complaint as he believes Streck does not hold a valid Option to Purchase the Property due in part to an Event of Default pursuant to the Lease Agreement. Co-Manager Connie Ryan disagrees with Dr. Ryan, and the Co-Managers have been unable to agree on the management of the [L.L.C.]
>
> . . . Co-Manager Connie Ryan has declined Dr. Ryan's request to recuse herself from the management of the [L.L.C.], and Dr. Ryan has similarly declined to allow Connie Ryan to serve as sole Manager of the [L.L.C.] As

> a result of the Co-Managers' disagreements, the [L.L.C.] is unable to retain legal counsel to respond to Streck's Complaint in the above-captioned case.
>
> . . . In light of their disagreement, the Co-Managers believe that appointment of [a] Receiver for the [L.L.C.] is necessary and appropriate to respond to Streck's Complaint and avoid default for failure to Answer.

No party opposed the comanagers' request, and the court appointed a receiver to represent the L.L.C.'s interest in the lawsuit.

On March 3, 2016, the receiver, on behalf of the L.L.C., filed an answer and counterclaim. The counterclaim alleged that Streck was in default of the lease agreement when it attempted to exercise the option and that the default voided Streck's right to exercise the option.

On June 15, 2016, Streck moved for partial summary judgment, asking the court to find as a matter of law that it was not in default at the time it exercised the option to purchase. At the hearing on the partial summary judgment motion, the parties offered a joint stipulation, which the court received. Posthearing briefing was permitted, and the matter was set for further proceedings on July 5.

### 4. Complaint in Intervention

On June 22, 2016, Ryan filed a "Complaint in Intervention" seeking to intervene "on her own behalf and derivatively on behalf of the [L.L.C.]" On June 27, she moved to continue the summary judgment hearing scheduled for July 5. On June 29, Ryan filed a "Motion for Order Permitting Complaint in Intervention" asking for "an order permitting her to intervene [and] allowing her Complaint in Intervention, filed and served on June 22, 2016."

All of Ryan's motions were taken up at a hearing on July 1, 2016. On July 5, the court entered two orders. One order overruled Ryan's motion to intervene, and the other overruled her motion to continue the summary judgment hearing.

Neither order set forth the court's reasoning. Ryan appeals from both orders. We moved the appeal to our docket on our own motion.[1]

## II. ASSIGNMENTS OF ERROR

Ryan assigns, restated, that the district court erred in (1) disallowing her complaint in intervention; (2) denying her motion to intervene, including her request for access to the parties' prior discovery and her request to conduct additional discovery; and (3) failing to continue the hearing on Streck's motion for summary judgment or to reopen the summary judgment record to allow her an opportunity to conduct necessary discovery and to participate in the summary judgment proceedings.

## III. STANDARD OF REVIEW

[1] Whether a party has the right to intervene in a proceeding is a question of law.[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[3]

## IV. ANALYSIS

### 1. Jurisdiction

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] Since at least 1985, we have held that an order denying intervention is a final order for purposes of appeal.[5] Streck acknowledges this, but contends that our final order jurisprudence has failed to consider the

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[1] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[2] *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

[3] *Id.*

[4] *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002).

[5] *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985).

effect of the Legislature's adoption in 2000 of Neb. Rev. Stat. § 25-1315 (Reissue 2016). Section 25-1315(1) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Streck argues that the order denying Ryan's motion to intervene did not meet the requirements of § 25-1315, because it did not contain an express determination that there was no just reason for delay and it did not expressly direct entry of judgment.

[4] We conclude § 25-1315 does not modify our final order jurisprudence as it regards orders denying intervention. The plain language of the statute references claims, counterclaims, cross-claims, and third-party claims, but does not mention complaints in intervention. Moreover, even after § 25-1315 was enacted, we continued to apply our existing final order jurisprudence to orders denying intervention,[6] and we see no principled basis to depart from that precedent. For these reasons, we conclude that our final order jurisprudence regarding orders denying intervention was not superseded by § 25-1315

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[6] See, *Spear T Ranch v. Knaub*, 271 Neb. 578, 713 N.W.2d 489 (2006); *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005).

and that the order denying Ryan's motion to intervene is a final, appealable order. We have jurisdiction over this appeal, and Streck's arguments to the contrary are without merit.

## 2. Intervention

### (a) Legal Framework

The right to intervene is granted by statute in Nebraska. Neb. Rev. Stat. § 25-328 (Reissue 2016) provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

Ryan bases her intervention rights solely on § 25-328, so we begin by reviewing the legal propositions governing such intervention.

[5-8] As a prerequisite to intervention under § 25-328, the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.[7] An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.[8] Simply having a claim that arises out of the same facts as the claims at issue in the litigation does not constitute having a sufficient interest to support intervention.[9] Therefore, a person seeking to intervene must allege facts showing that

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[7] *Spear T Ranch v. Knaub, supra* note 6.

[8] *Id.*

[9] See *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959).

he or she possesses the requisite legal interest in the subject matter of the action.[10] For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the complaint are true.[11]

[9,10] Our jurisprudence also recognizes some practical limitations on the right to intervene. A prospective intervenor can raise his or her claims or defenses, but those claims or defenses must involve the same core issue as the claims between the existing parties.[12] Intervenors can raise only issues that "sustain or oppose the respective contentions of the [original parties]."[13] The intervenor is bound by any determinations that were made before he or she intervened in the action.[14] In other words, "'[a]n interven[o]r must take the suit as he finds it . . . .'"[15]

With these principles in mind, we review Ryan's complaint in intervention to determine whether she has alleged a direct and legal interest sufficient to support intervention.

(b) Ryan's Complaint to Intervene

Ryan alleges she has a nearly 20-percent interest in the L.L.C. as a member thereof. She further alleges the interests of the L.L.C. are not being "fully protected" by the receiver, and she alleges the receiver should have asserted additional claims and defenses on behalf of the L.L.C. She also seeks by intervention to challenge the appointment of the receiver and to present a claim that the comanagers of the L.L.C. breached the operating agreement by requesting appointment of a receiver.

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[10] *Spear T Ranch v. Knaub, supra* note 6.

[11] *Id.*

[12] See *Ruzicka v. Ruzicka, supra* note 2.

[13] *State ex rel. Nelson v. Butler*, 145 Neb. 638, 650, 17 N.W.2d 683, 691 (1945).

[14] See *School Dist. of Gering v. Stannard*, 196 Neb. 367, 242 N.W.2d 889 (1976).

[15] *Drainage District v. Kirkpatrick-Pettis Co.*, 140 Neb. 530, 538, 300 N.W. 582, 587 (1941).

Before we address whether Ryan has shown a direct and legal interest sufficient to allow her to intervene, we note that to the extent Ryan seeks by intervention to challenge the appointment of the receiver or allege the L.L.C. managers have breached the operating agreement, she is attempting improperly to expand the scope of the litigation. As stated earlier, the claims or defenses of an intervenor must involve the same core issues as the claims between the existing parties,[16] and intervenors can raise only issues that "sustain or oppose the respective contentions of the [original parties]."[17] Here, the dispute between the original parties is over whether there was a breach of the lease agreement. The suit does not involve either the validity of the appointment of the receiver or any potential breach of the operating agreement. Thus, Ryan's claims challenging the appointment of the receiver or the comanagers' breach of the operating agreement cannot provide a basis for her right to intervene in this action, and we will not address those claims further.

*(i) No Right to Intervene in Ryan's Own Behalf*

To support her claim of a direct and legal interest sufficient to support the right to intervene in her own behalf, Ryan argues she is a 20-percent member of the L.L.C. and stands to lose or gain financially depending on how the court resolves the dispute between the L.L.C. and Streck. Before addressing this argument, we clarify the nature of Ryan's rights as a member of the L.L.C.

[11] Ryan's rights in that regard are governed by the Nebraska Uniform Limited Liability Company Act (LLC Act)[18] and the terms of the L.L.C.'s operating agreement. Subject to certain enumerated exceptions not relevant here, most matters

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[16] See *Ruzicka v. Ruzicka, supra* note 2.

[17] *State ex rel. Nelson v. Butler, supra* note 13, 145 Neb. at 650, 17 N.W.2d at 691.

[18] Neb. Rev. Stat. § 21-101 et seq. (Reissue 2012 & Cum. Supp. 2016).

are governed by the operating agreement entered into by the members of the L.L.C., and the LLC Act governs only when the operating agreement is silent.[19]

[12,13] As pertinent here, the LLC Act provides that a member of a limited liability company is deemed to assent to the operating agreement.[20] And, specifically, "[i]n a manager-managed limited liability company, . . . [e]xcept as otherwise expressly provided in the [LLC Act], any matter relating to the activities of the company is decided *exclusively* by the managers."[21]

The L.L.C. operating agreement, a copy of which was attached to Ryan's complaint in intervention, provides: "The Members of the Company vest the management of the Company in a Management Board, which shall have *sole* power and authority to conduct the affairs of the Company . . . ." The operating agreement also gives the managers the right "[t]o employ . . . managing agents or other experts to perform services for the Company and . . . [t]o enter into any and all other agreements on behalf of the Company, with any other Person for any purpose, in such forms as the Managers may approve." Based on the provisions of the LLC Act and the operating agreement, Ryan has no legal authority to conduct the affairs of the L.L.C.

Ryan contends that despite being a nonmanaging member of the L.L.C., she nevertheless has a direct and legal interest in the suit which entitles her to intervene, because she stands to lose or gain financially depending on how the court resolves the dispute between the L.L.C. and Streck. We considered, and rejected, a similar argument in *Steinhausen v. HomeServices of Neb.*[22]

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[19] See § 21-110.

[20] § 21-111(b).

[21] § 21-136(c)(1) (emphasis supplied).

[22] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

There, the sole member of a limited liability company (LLC) filed a complaint on behalf of himself and the LLC, alleging a third party had engaged in tortious interference with the business relationships or expectancies of the LLC. We held that members of an LLC cannot, in their own behalf, maintain a claim for tortious interference with the business relationships or expectancies of an LLC, because such a claim can be maintained only by the parties to the business relationship.[23] We specifically reasoned that even though a member of an LLC might experience reduced distributions from the LLC if the LLC's relationships are interfered with, it did not convert the claim into one in behalf of the member personally.[24]

[14] Here, neither the operating agreement nor the LLC Act gives Ryan the authority to speak for, or make decisions for, the L.L.C., even in matters that may indirectly affect her financial interests. That power is vested exclusively with the managers of the L.L.C. and anyone they appoint pursuant to their power to employ others to perform services for the L.L.C. The fact that Ryan, as a member of the L.L.C., may experience reduced distributions, depending on the outcome of the lawsuit against the L.L.C., does not give her a direct and legal interest in the lawsuit sufficient to support intervention in her own behalf.

Moreover, Ryan does not allege she was owed a special duty by the receiver separate and distinct from the duty owed to the L.L.C.[25] Nor does she allege any financial injury or damage sustained in her individual capacity that would be distinct from that sustained by other L.L.C. members.[26] Under these circumstances, Ryan's membership interest in the L.L.C. does not give her a direct and legal interest sufficient to allow

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[23] *Id.*

[24] *Id.*

[25] See *Freedom Fin. Group v. Woolley*, 280 Neb. 825, 792 N.W.2d 134 (2010).

[26] See *id.*

her to intervene in her own behalf in the action. We reject her arguments to the contrary.

*(ii) No Right to Intervene on L.L.C.'s Behalf*

Ryan also argues she has the right to intervene on behalf of the L.L.C. She asserts that Streck is seeking to buy the L.L.C.'s only asset and alleges that the interests of the L.L.C. have not been "fully protected" by the comanagers and receiver.

[15] To determine whether Ryan has a direct and legal interest sufficient to allow her to intervene on behalf of the L.L.C., we find guidance in the law governing whether and when a shareholder of a corporation may intervene on behalf of the corporation. This is so because we have generally treated actions by a member of an LLC in the same manner as actions by a shareholder of a corporation.[27]

[16] As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property.[28] Such a cause of action is in the corporation and not the shareholders.[29] The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.[30]

The LLC Act provides a means to bring a derivative action. Section 21-165 states:

> A member may maintain a derivative action to enforce a right of [an LLC] if:
>
> (1) the member first makes a demand on the other members in a member-managed [LLC], or the managers of a manager-managed [LLC], requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or

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[27] See *id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

(2) a demand under subdivision (1) of this section would be futile.

Ryan's complaint in intervention alleges that she "made demand upon the receiver" to assert the additional claims and defenses she wished to raise in this litigation, but that the receiver refused to do so. Alternatively, Ryan alleges that demand upon the managers and receiver would have been futile, because the managers admitted they could not agree to a course of action and the receiver refused to assert the claims and defenses Ryan wished to raise in this litigation. But Ryan has not filed a derivative action, nor does she argue that she has met the requirements for bringing such an action here.

[17] Instead, Ryan primarily relies on this court's decision in *State v. Holmes*[31] to support her motion to intervene on behalf of the L.L.C. In *Holmes*, a receiver had been appointed to represent an insolvent corporation. A shareholder sought to intervene to protect the interests of the corporation, alleging that the corporation was "not represented" in the action, that the corporate officers "refuse[d] to act," and that "the rights of stockholders [were], therefore, unprotected."[32] The shareholder alleged that although a receiver had been appointed, it was done at the request of and for the benefit of the insolvent corporation's creditors. The shareholder further alleged that the receiver had handled the insolvent corporation's assets in a "reckless and improvident manner, and that, if his actions are permitted to go unchallenged, he will waste and dissipate a large amount of valuable property belonging to the [corporation]."[33] On those unique facts, this court observed that the rights of the shareholders were completely unprotected, and we held that the shareholder could intervene on behalf of the corporation, reasoning that "[w]here the corporation can not, or will not, protect the interests of the

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[31] *State v. Holmes*, 60 Neb. 39, 82 N.W. 109 (1900).

[32] *Id.* at 41, 82 N.W. at 109.

[33] *Id.*

stockholders, the [stockholders] may intervene for their own protection."[34] As such, our decision in *Holmes* recognized a very limited exception to the general rule that a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property.[35] But Ryan has not alleged anything which suggests the exception applies here to support her intervention.

Unlike the facts in *Holmes*, Ryan has not alleged the receiver is completely failing to protect the interests of the L.L.C. and its members, nor would the record support such an inference. The record shows the receiver was appointed at the joint request of the comanagers to "address, answer, and/or defend the Complaint filed . . . by Streck" and has been doing so. Ryan's briefing argues that the receiver could or should be managing the litigation differently, but she has not alleged that the receiver cannot or will not protect the interests of the L.L.C. or its members. On these facts, *Holmes* is inapplicable, and Ryan has argued no other basis for claiming a direct and legal interest sufficient to authorize her intervention on behalf of the L.L.C.

[18] On this record, we conclude Ryan has not alleged a direct and legal interest sufficient to support intervention in the litigation between the L.L.C. and Streck. As such, we do not address her remaining assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[36]

## V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

Miller-Lerman and Kelch, JJ., not participating.

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[34] *Id.* at 43, 82 N.W. at 110.

[35] See *Freedom Fin. Group v. Woolley, supra* note 25.

[36] *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Lindsay International Sales & Service, LLC, appellee, v. Michael J. Wegener, an individual, and Jerome Pribil, an individual, appellants.

901 N.W.2d 278

Filed September 15, 2017. No. S-16-1051.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Statutes.** Statutory interpretation is a question of law.
3. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Jurisdiction: Time: Notice: Appeal and Error.** In order to vest an appellate court with jurisdiction, a party must file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing.
5. **Motions for New Trial: Time: Notice: Appeal and Error.** A timely motion for new trial terminates the running of the time for filing a notice of appeal, giving the party 30 days from the entry of the order denying the motion to file a notice of appeal.
6. **Statutes: New Trial.** The plain language of the savings clause in Neb. Rev. Stat. § 25-1144.01 (Reissue 2016) does not contain a finality requirement.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Inbody and Pirtle, Judges, on appeal thereto from the District Court for Platte County, Robert R. Steinke, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Stephen L. Ahl and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., and Barry D. Geweke, of Stowell & Geweke, P.C., L.L.O., for appellants.

John M. Lingelbach, of Koley Jessen, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

The Nebraska Court of Appeals dismissed this appeal, finding it was not timely filed. On further review, we apply the savings clause of Neb. Rev. Stat. § 25-1144.01 (Reissue 2016) and conclude the notice of appeal was timely filed. We therefore reinstate the appeal and remand the matter to the Court of Appeals for further proceedings.

## FACTS

### Proceedings in District Court

Lindsay International Sales & Service, LLC (Lindsay), sued Jerome Pribil and Michael J. Wegener to collect amounts due on a guaranty. The case was tried to a jury, and on July 21, 2016, the jury returned a verdict in favor of Lindsay for $1,019,795.38. The court accepted the jury's verdict on the record and discharged the jurors. The verdict forms were filed with the clerk the same day, but judgment on the verdict was not entered until 5 days later.

Four days after the jury returned its verdict, Lindsay filed a motion for costs. On the same day, Pribil and Wegener filed a motion for new trial. Both motions were efiled on July 25, 2016; the time stamp on the motion for costs shows it was accepted for filing approximately 2 hours before the motion for new trial.

The next day, on July 26, 2016, the court entered judgment on the jury's verdict. The judgment specifically noted, "The

assessment of court costs, which is the subject of a separate motion filed by [Lindsay] and scheduled for hearing to be conducted on August 5, 2016, will be addressed by separate order of the Court." The judgment did not mention the motion for new trial, but in a separate order, the court set a hearing date of September 12 for the motion for new trial.

On August 8, 2016, the court entered an order awarding Lindsay costs of $3,457.20. On October 14, the court entered an order overruling the motion for new trial. On November 9, Pribil and Wegener filed a notice of appeal. For easy reference, the following timeline summarizes the critical dates:

- July 21: Jury returns verdict; court accepts verdict.
- July 25: Lindsay files a motion for costs.
- July 25: Pribil and Wegener file a motion for new trial.
- July 26: Court enters judgment on the jury verdict.
- August 8: Court grants Lindsay's motion for costs.
- September 12: Hearing held on motion for new trial.
- October 14: Court overrules motion for new trial.
- November 9: Pribil and Wegener file notice of appeal.

### Proceedings in Court of Appeals

After ordering the parties to show cause, the Court of Appeals dismissed the appeal without opinion, finding it lacked appellate jurisdiction. The court reasoned:

> The motion for new trial filed on July 25, 2016 was filed before the final order entered on August 8, 2016. See *J & H Swine v. Hartington Concrete*, 12 Neb[.] App. 885, 687 N.W.2d 9 (2004). A premature motion for new trial is a nullity and, thus, the November 9, 2016 notice of appeal was untimely. See *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 [(2015)] (citing *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002)).

Pribil and Wegener filed a timely motion for rehearing, arguing the motion for new trial was effective, and not a nullity, under the plain language of § 25-1144.01. That statute

provides, in relevant part, that "[a] motion for a new trial filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof." A divided panel of the Court of Appeals denied rehearing, reasoning that the motion for new trial had been filed "prior to the district court's ruling on costs, i.e., before the announcement of a final judgment," so the motion was a nullity. We granted Pribil and Wegener's petition for further review.

## ASSIGNMENTS OF ERROR

On further review, Pribil and Wegener assign, restated and consolidated, that the Court of Appeals erred in (1) dismissing their appeal as untimely, (2) concluding their motion for new trial was a nullity, and (3) misapplying the second sentence, or savings clause, of § 25-1144.01.

## STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[1]

[2] Statutory interpretation is a question of law.[2]

[3] An appellate court reviews questions of law independently of the lower court's conclusion.[3]

## ANALYSIS

[4,5] In order to vest an appellate court with jurisdiction, a party must file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is

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[1] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013); *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

[2] *First Nat. Bank of Omaha v. Davey*, 285 Neb. 835, 830 N.W.2d 63 (2013); *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200, 803 N.W.2d 17 (2011).

[3] *Maclovi-Sierra v. City of Omaha*, 290 Neb. 443, 860 N.W.2d 763 (2015); *VKGS v. Planet Bingo*, 285 Neb. 599, 828 N.W.2d 168 (2013).

appealing.[4] But under § 25-1912(3)(a), a timely motion for new trial under § 25-1144.01 will terminate the running of the time for filing a notice of appeal, giving the party 30 days from the entry of the order denying the motion to file a notice of appeal.[5]

Here, the timeliness of the notice of appeal filed by Pribil and Wegner depends on whether their motion for new trial was an effective terminating motion, or instead was a nullity. The Court of Appeals concluded the motion was a nullity, because it was filed before the announcement of a final order. Pribil and Wegner argue that the court did not properly apply § 25-1144.01, which provides:

> A motion for a new trial shall be filed no later than ten days after the entry of the judgment. A motion for a new trial filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof.

The second sentence of § 25-1144.01 has been referred to as a "savings clause"[6] and was added to the statute in 2004. Before discussing the application of the savings clause to the present appeal, we provide some historical perspective.

## History of § 25-1144.01

In *Macke v. Pierce*,[7] decided in 2002, we interpreted an earlier version of § 25-1144.01. The version in effect at that time provided that a motion for new trial had to be filed "no later

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[4] Neb. Rev. Stat. § 25-1912(1) (Reissue 2016). See *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015).

[5] See § 24-1144.01.

[6] *Despain v. Despain, supra* note 4, 290 Neb. at 43, 858 N.W.2d at 574 (Cassel, J., concurring).

[7] *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002) (superseded by statute as stated in *Despain v. Despain, supra* note 4).

than ten days after the entry of judgment."[8] *Macke* held that a motion for new trial filed before the entry of a judgment was a nullity, as was the trial court's ruling on such a motion for new trial, and that such a motion for new trial did not terminate the time for taking an appeal.

In 2004, presumably in response to our decision in *Macke*, the Legislature added the second sentence, or savings clause, to § 25-1144.01. We addressed the effect of this statutory change in *Despain v. Despain*.[9] In that dissolution action, the husband filed a motion for new trial after the court distributed an unsigned journal entry reciting its substantive decision, but before the court filed the signed dissolution decree. A few days later, the court filed a signed decree. The court ultimately overruled the motion for new trial, and the husband filed an appeal within 30 days of the order overruling his motion for new trial. The wife asserted the appeal should be dismissed as untimely, arguing the motion for new trial was a nullity and did not terminate the time for filing an appeal because the motion had been filed before the signed decree was entered.

We rejected this argument in light of the new savings clause language in § 25-1144.01. We noted that "under the 2004 amendment, a motion for new trial filed after the announcement of the decision but before the entry of the judgment is no longer a nullity."[10] We implicitly held that the unsigned journal entry provided to counsel was the requisite "'announcement of a verdict or decision'" under § 25-1144.01, and we reasoned that because the motion for new trial was filed after the announcement of the court's decision but before the court entered judgment by filing the signed decree, it was an effective terminating motion under

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[8] See § 25-1144.01 (Cum. Supp. 2000).

[9] *Despain v. Despain, supra* note 4.

[10] *Id.* at 39, 858 N.W.2d at 572.

the plain language of the savings clause in § 25-1144.01.[11] Consequently, we found the notice of appeal was timely, because it was filed within 30 days after the motion for new trial was overruled.

## Application of § 25-1144.01 to Present Case

Pribil and Wegener contend that the savings clause of § 25-1144.01 rendered their motion for new trial effective and timely. They argue their motion was "filed after the announcement of a verdict or decision but before the entry of judgment" and thus must be "treated as filed after the entry of judgment and on the day thereof."[12] At oral argument, Lindsay agreed with this argument. We do too.

The motion for new trial was filed after the court announced the jury's verdict, but before the entry of judgment. As such, the plain language of § 25-1144.01 requires that the motion be treated as filed "after the entry of judgment and on the day thereof," making it a timely and effective terminating motion.[13]

The Court of Appeals' reasoning in its order denying the motion for rehearing suggests it was concerned by the fact that Lindsay filed a motion for costs just before the motion for new trial was filed. Relying on its decision in *J & H Swine v. Hartington Concrete*,[14] the Court of Appeals reasoned, "Because the appellants filed their motion for new trial prior to the district court's ruling on costs, i.e., *before the announcement of a final judgment*, the filing of their motion for a new trial was ineffective." (Emphasis supplied.) But the reasoning of *J & H Swine* is not applicable here.

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[11] *Id.* at 38, 858 N.W.2d at 571.

[12] See, § 25-1144.01 (Reissue 2016); *Despain v. Despain, supra* note 4.

[13] *Id.*

[14] *J & H Swine v. Hartington Concrete*, 12 Neb. App. 885, 687 N.W.2d 9 (2004).

*J & H Swine* was based on this court's opinion in *In re Guardianship & Conservatorship of Woltemath*,[15] but neither *J & H Swine* nor *In re Guardianship & Conservatorship of Woltemath* addressed the savings clause under § 25-1144.01. Instead, both cases addressed the savings clause in § 25-1912(2), a statute that governs notices of appeal.

The savings clause in § 25-1912(2) is similar to the savings clause in § 25-1144.01, with one important distinction: § 25-1912(2) expressly references "final" orders:

> A notice of appeal or docket fee filed or deposited after the *announcement of a decision or final order* but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

(Emphasis supplied.)

*In re Guardianship & Conservatorship of Woltemath* focused on the plain language of § 25-1912(2) and held that an "'announcement of a decision or final order'" under § 25-1912(2) must be of "a decision or final order that would have been appealable if followed immediately by the entry of judgment."[16] In other words, to trigger the savings clause for premature notices of appeal under § 25-1912(2), an announcement must pertain to a decision or order that, once entered, would be final and appealable.

The Court of Appeals appears to have applied this same reasoning to motions for new trial under § 25-1144.01, and concluded that because the motion for new trial was filed before the district court's decision on the motion for costs, it was not filed after the requisite "announcement of a

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[15] *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

[16] *In re Guardianship & Conservatorship of Woltemath, supra* note 15, 268 Neb. at 40, 680 N.W.2d at 148, citing *FirsTier Mtge. Co. v. Investors Mtge. Ins. Co.*, 498 U.S. 269, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991).

verdict or decision."[17] But reading a finality requirement into § 25-1144.01 is inconsistent with the plain language of the statute. Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[18] An appellate court will not read into a statute a meaning that is not there.[19]

The plain and unambiguous language of § 25-1144.01, unlike § 25-1912(2), contains no requirement that the "announcement" be of a *final* "verdict or decision."[20] And the instant case illustrates the practical difficulty of reading a finality requirement into the savings clause under § 25-1144.01.

Here, Pribil and Wegener filed their motion for new trial after the jury's verdict was announced on the record. From their perspective, the substantive decision on those proceedings had been made, so they filed their motion for new trial even though the court had not yet entered judgment on that verdict. This appears to be precisely the circumstance the Legislature intended to address by adding the savings clause to § 25-1144.01 in 2004. The filing of a motion for costs after the announcement of the verdict but before the motion for new trial was filed does not change the analysis under § 25-1144.01.

[6] The plain language of the savings clause in § 25-1144.01 does not contain a finality requirement. Section 25-1144.01 merely requires an "announcement of a verdict or decision." Here, the motion for new trial was filed after the announcement of the jury's verdict and before the entry of judgment.

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[17] See § 25-1144.01.

[18] *Schuyler Apt. Partners v. Colfax Cty. Bd. of Equal.*, 279 Neb. 989, 783 N.W.2d 587 (2010); *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010).

[19] *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015); *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

[20] See § 25-1144.01.

As such, it fell within the savings clause under § 25-1144.01, and must be treated as having been filed immediately after the judgment was entered on the jury's verdict. The motion for new trial was an effective filing and was not a nullity.

Because a proper and timely motion for new trial terminates the running of time for filing a notice of appeal,[21] the appeal time did not start to run until the motion for new trial was ruled upon on October 14, 2016. Pribil and Wegener filed their notice of appeal within 30 days of that date, and their appeal should not have been dismissed as untimely.

## CONCLUSION

For the foregoing reasons, we reinstate the appeal and remand the cause to the Court of Appeals for further proceedings.

Reversed and remanded for further proceedings.

Miller-Lerman, J., not participating.

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[21] See *Despain v. Despain, supra* note 4.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Matt Karo and Michael Karo, appellees, v. NAU Country Insurance Company, appellant.

901 N.W.2d 689

Filed September 22, 2017. No. S-16-810.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Arbitration and Award: Federal Acts: Contracts.** If arbitration arises from a contract involving interstate commerce, it is governed by the Federal Arbitration Act.
3. **Arbitration and Award: Federal Acts: Contracts: Insurance: Crops.** The arbitration of disputes arising under federally reinsured crop insurance contracts plainly involves interstate commerce and, as such, is governed exclusively by the Federal Arbitration Act.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. This is so even where neither party has raised the issue.
5. **Federal Acts: Jurisdiction: Time.** To determine whether a time limit in a federal statute is a jurisdictional requirement, an appellate court inquires whether Congress has "clearly stated" that the rule is jurisdictional; absent such a clear statement, courts should treat the restriction as nonjurisdictional in character.
6. **Arbitration and Award: Federal Acts: Jurisdiction: Notice: Limitations of Actions: Appeal and Error.** The clear language of 9 U.S.C. § 9 (2012) indicates Congress intended the statutory time limits on serving notice of an application for judicial review under the Federal Arbitration Act to be jurisdictional.
7. **Arbitration and Award: Federal Acts: Limitations of Actions: Appeal and Error.** Under the Federal Arbitration Act, once the arbitrator has heard a case and entered an award, Congress has placed strict limitations on judicial review of the arbitration award by placing

temporal limits on when a court is authorized to review an award and by limiting the grounds upon which a court is authorized to vacate or modify an award. In that regard, streamlined judicial review of an arbitrator's award under the Federal Arbitration Act is similar to a restricted appellate review.

8. **Jurisdiction: Limitations of Actions: Appeal and Error.** Statutory time limits on appellate review are almost always considered jurisdictional in nature, both historically and presently, and strict compliance with such time limits is necessary.
9. **Jurisdiction: Limitations of Actions: Dismissal and Nonsuit: Appeal and Error.** The statutory time limits on notices of appeal are more than simple claim-processing rules, and when an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.
10. **Arbitration and Award: Federal Acts: Notice: Time: Appeal and Error.** Similar to a notice of appeal, the Federal Arbitration Act's requirement that those seeking expedited judicial review must serve notice of their application in a certain manner and within a specified timeframe is more than a simple claim-processing rule; it is the statutory procedure that defines which forum has authority over the dispute and delineates the classes of cases the court may review.
11. **Arbitration and Award: Federal Acts: Jurisdiction: Motions to Vacate: Notice: Time.** The notice requirement under 9 U.S.C. § 12 (2012) is jurisdictional in nature, and a party's failure to serve notice of an application for judicial vacatur in the manner directed and within the time limits required has jurisdictional consequences.
12. **Judgments: Jurisdiction.** When a court lacks jurisdiction and nonetheless enters an order, such order is void.
13. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** A void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on a court.

Appeal from the District Court for Holt County: Mark D. Kozisek, Judge. Vacated and dismissed.

Thomas M. Locher and Amy Locher, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., and Mitch D. Carthel, of Mullin, Hoard & Brown, L.L.P., for appellant.

Sean A. Minahan, of Lamson, Dugan & Murray, L.L.P., for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

This is an appeal from a judgment of the Holt County District Court vacating an arbitration award under the Federal Arbitration Act (FAA).[1] Because we conclude the district court lacked jurisdiction to vacate the arbitration award, we vacate the district court's judgment and dismiss the appeal.

## I. FACTS

Matt Karo and Michael Karo farm together in Holt County, Nebraska. They each obtained federally reinsured crop insurance policies, serviced by NAU Country Insurance Company (NAU), for the acres at issue in this dispute.

In 2012, the Karos submitted "prevented planting" claims under their crop insurance policies, claiming they were unable to plant corn on certain acres due to wet conditions. Federal crop insurance policies are uniform, and the provisions of the policies are codified at 7 C.F.R. § 457.8 (2017). "Prevented planting" for the purpose of federal crop insurance is defined as follows:

> Failure to plant the insured crop by the final planting date designated in the Special Provisions for the insured crop in the county, or within any applicable late planting period, due to an insured cause of loss that is general to the surrounding area and that prevents other producers from planting acreage with similar characteristics. Failure to plant because of uninsured causes such as lack of proper equipment or labor to plant the acreage, or use of a particular production method, is not considered prevented planting.[2]

The policies issued to the Karos also provided, "[I]f it is possible for you to plant on or prior to the final planting date

[1] 9 U.S.C. § 1 et seq. (2012).

[2] 7 C.F.R. § 457.8, ¶ 1.

when other producers in the area are planting and you fail to plant, no prevented planting payment will be made."[3]

It is undisputed that in 2012, the Karos did not plant their corn crop on the insured acres prior to the final planting date. The Karos claimed continuous wet conditions prevented them from doing so. The Karos did not attempt to plant corn during the late planting period, but did plant soybeans on some acres.

NAU denied the Karos' prevented planting claims. It found that excessive moisture was not general to the surrounding area and did not prevent other producers from planting acres with similar characteristics.

### 1. Arbitration

Pursuant to a mandatory arbitration clause in the crop insurance policies,[4] the parties submitted their disputes to binding arbitration. After an evidentiary hearing, the arbitrator issued a final arbitration award in favor of NAU, denying the Karos' claims under the "prevented planting coverage" of the crop insurance policies. The arbitration award denying coverage was issued January 21, 2014.

In denying coverage, the arbitrator found "[t]he evidence as presented, concerning the excessive moisture in the area in early spring, did not prevent most other producers with acreage with similar characteristics from planting their acres."

### 2. The Karos Seek to Judicially Vacate Arbitration Award

On May 15, 2014, the Karos filed what they termed a "Petition for Judicial Review" in the Holt County District Court seeking to vacate the arbitration award under § 10 of the FAA.[5] Section 10(a) provides:

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[3] *Id.*, § 457.8, ¶ 17(d)(2).

[4] See *id.*, § 457.8, ¶ 20(a) ("[For Reinsured Policies]").

[5] See 9 U.S.C. § 10.

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The Karos relied on § 10(a)(4) to support their request to vacate the award.

NAU filed a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6), alleging the Karos had failed to state a claim upon which relief could be granted. The district court overruled the motion and required NAU to file an answer. NAU's answer generally denied the Karos' complaint for vacatur, and it set forth several affirmative defenses, but NAU did not file an application or motion to confirm the award.[6]

In March 2016, all parties moved for summary judgment. After an evidentiary hearing, the court granted the Karos' summary judgment motion and vacated the arbitration award under § 10(a)(4) of the FAA, finding that the arbitrator exceeded his powers and manifestly disregarded the law.

NAU timely appealed from that judgment, and we granted its petition to bypass the Nebraska Court of Appeals.

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[6] See 9 U.S.C. § 9.

## II. ASSIGNMENTS OF ERROR

NAU assigns, restated, that the district court erred in (1) reviewing and vacating the arbitration award; (2) applying the manifest disregard of the law doctrine; (3) ruling that the arbitrator exceeded his powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made; and (4) refusing to grant NAU's motion for summary judgment.

## III. STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[7]

## IV. ANALYSIS

### 1. FAA Governs This Appeal

[2,3] As a threshold matter, we agree with the district court and the parties that the issues presented in this appeal are governed by the FAA. It is well-settled that "if arbitration arises from a contract involving interstate commerce, it is governed by the FAA."[8] The arbitration of disputes arising under federally reinsured crop insurance contracts plainly involves interstate commerce and, as such, is governed exclusively by the FAA.[9]

### 2. Judicial Vacatur Under FAA

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it

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[7] *In re Interest of Luz P. et al.*, 295 Neb. 814, 891 N.W.2d 651 (2017).

[8] *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 703, 757 N.W.2d 205, 209 (2008).

[9] *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010); *Svancara v. Rain and Hail, LLC*, No. 8:09CV144, 2009 WL 2982906 (D. Neb. Sept. 11, 2009) (unpublished memorandum and order) (citing *Nobles v. Rural Community Ins. Services*, 122 F. Supp. 2d 1290 (M.D. Ala. 2000)).

has jurisdiction over the matter before it.[10] This is so even where, as here, neither party has raised the issue.[11] The threshold issue we must address is whether the Karos satisfied the statutory preconditions to seeking judicial vacatur under the FAA.

"Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"[12] The FAA includes mechanisms for enforcing arbitration awards in state and federal courts that have jurisdiction,[13] including provisions for obtaining judicial confirmation of the award,[14] and separate provisions for judicial vacatur[15] or modification[16] of an award. The U.S. Supreme Court has described these provisions as providing "expedited judicial review"[17] of arbitration awards, and it has observed that "[a]n application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court."[18]

We observe that in the present case, the district court and the parties appear to have treated the Karos' request for

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[10] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[11] *Schlake v. Schlake*, 294 Neb. 755, 885 N.W.2d 15 (2016).

[12] *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576, 581, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008).

[13] *Hall Street Associates, L. L. C., supra* note 12.

[14] 9 U.S.C. § 9.

[15] *Id.*, § 10.

[16] *Id.*, § 11

[17] *Hall Street Associates, L. L. C., supra* note 12, 552 U.S. at 592.

[18] *Id.*, 552 U.S. at 582. See, also, 9 U.S.C. § 6 ("[a]ny application to the court [under the FAA] shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided").

judicial vacatur not as a motion, but, rather, as an ordinary civil complaint, governed by the Nebraska Court Rules of Pleading in Civil Cases and amenable to motions for summary judgment under Neb. Rev. Stat. § 25-1330 et seq. (Reissue 2016). While the procedure used here runs contrary to that mandated by the FAA and threatens to develop expedited judicial vacatur into full scale litigation with evidentiary hearings and dispositive motions,[19] no one assigns this as error, and in any event, the procedure followed does not drive our disposition of this case. Instead, our disposition focuses on the statutory 3-month notice requirement for seeking judicial vacatur under the FAA[20] and whether that requirement is jurisdictional in nature.

Section 12 of the FAA governs motions to vacate and modify awards under §§ 10 and 11 of the FAA.[21] Section 12 provides, in relevant part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

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[19] See *O.R. Securities v. Professional Planning Assoc.*, 857 F.2d 742 (11th Cir. 1988) (under FAA and Federal Rules of Civil Procedure, proper way to request judicial vacatur is filing motion in district court rather than complaint; one defending award should not have burden of dismissing complaint).

[20] 9 U.S.C. § 12.

[21] See *id.*, §§ 10 through 12.

Use of the terms "must" and "shall" in 9 U.S.C. § 12 of the FAA leaves little room to argue that the requirements of serving notice are permissive rather than mandatory. And we understand the 3-month notice requirement to implicitly require filing the application within the same timeframe.

Here, the record shows the arbitration award was issued January 21, 2014. It was received January 23, but the Karos did not move to vacate the award until May 15, when they filed the application in the district court and provided NAU notice of the same via U.S. mail. Because the Karos' motion to vacate was filed and served outside the 3-month period mandated by § 12, we must determine the legal effect, if any, of the Karos' delay. The U.S. Supreme Court has not addressed this question, but the Eighth Circuit Court of Appeals has.

In *Piccolo v. Dain, Kalman & Quail, Inc.*,[22] the Eighth Circuit determined that serving notice within the 3-month timeframe under § 12 is a statutory precondition to judicial review of an arbitration award. In that case, pro se parties to an arbitration award governed by the FAA sought to vacate the award more than 3 months after it was issued. The federal district court dismissed the matter, finding that the parties' failure to serve notice within 3 months of the arbitration award deprived the court of power to review the award under the FAA. The Eighth Circuit Court of Appeals agreed, reasoning that "[a] party to an arbitration award who fails to comply with the statutory precondition of timely service of notice [under § 12 of the FAA] forfeits the right to judicial review of the award [under § 10 of the FAA]."[23] The court went on to conclude that a party's "failure to serve [a motion] to vacate within three months of the award deprived [the district court] of power

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[22] *Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598 (8th Cir. 1981).

[23] *Id.* at 600. See 9 U.S.C. §§ 10 and 12.

to review the award."[24] Other courts have reached similar conclusions.[25]

Although the Eighth Circuit in *Piccolo* did not expressly hold the 3-month notice requirement under § 12 jurisdictional, it implied as much by holding that a court's "power to review the award" is present only when the statutory preconditions of § 12 have been met.[26] "Jurisdiction" is a term that "refers to a court's adjudicatory authority,"[27] and the U.S. Supreme Court has observed that "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'"[28]

The Eighth Circuit's opinion in *Piccolo* has been cited with approval by one panel of the 10th Circuit Court of Appeals,[29] but another panel of the same circuit has concluded that the notice requirement in § 12 is more "in the nature of a statute of limitations, which is subject to waiver."[30] Other courts have relied upon the 3-month notice requirement under § 12 to preclude judicial consideration of untimely vacatur requests without expressly addressing whether the requirement is jurisdictional in nature.[31] And

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[24] *Piccolo, supra* note 22, 641 F.2d at 600.

[25] See, *Pfannenstiel v. Merrill Lynch, Pierce*, 477 F.3d 1155 (10th Cir. 2007); *Franco v. Prudential Bache Securities, Inc.*, 719 F. Supp. 63 (D. Puerto Rico 1989).

[26] *Piccolo, supra* note 22, 641 F.2d at 600.

[27] *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010).

[28] *Landgraf v. USI Film Products*, 511 U.S. 244, 274, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

[29] See *Pfannenstiel, supra* note 25.

[30] See *Foster v. Turley*, 808 F.2d 38, 41 (10th Cir. 1986). See 9 U.S.C. § 12.

[31] See, e.g., *Lafarge Conseils et Etudes, S.A. v. Kaiser Cement*, 791 F.2d 1334 (9th Cir. 1986); *White v. Mayflower Transit, LLC*, 481 F. Supp. 2d 1101 (C.D. Cal. 2007); *M.J. Woods, Inc. v. Conopco, Inc.*, 271 F. Supp. 2d 576 (S.D.N.Y. 2003); *Federated Rural Elec. Ins. Ex. v. Nationwide Mut.*, 134 F. Supp. 2d 923 (S.D. Ohio 2001).

while some courts have indirectly approached the jurisdictional question by considering whether the time limit in § 12 is subject to equitable tolling, those courts have reached inconsistent conclusions despite applying similar legal principles.[32]

The present case requires us to squarely address this unsettled question of federal law and decide whether the 3-month time limit in § 12 is a jurisdictional requirement. If it is, the Karos' delay in filing their application and serving notice deprived the district court of jurisdiction to vacate the award. If, however, the time limit is more in the nature of an affirmative defense, then NAU waived it by failing to raise it in the district court.[33]

Before undertaking this jurisdictional analysis, we pause to clarify that the question before us has little to do with the unrelated, but equally unsettled, question of when a federal court has subject matter jurisdiction under the FAA.[34] We are aware of the U.S. Supreme Court's decision in *Vaden v. Discover Bank*[35] and its holding that federal courts may hear claims under the FAA only when there is an independent basis for federal jurisdiction. In *Vaden*, the Court

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[32] Compare, e.g., *Move, Inc. v. Citigroup Global Markets, Inc.*, 840 F.3d 1152 (9th Cir. 2016) (3-month time limit under FAA is subject to equitable tolling), and *Chilcott Entertainment v. John G. Kinnard*, 10 P.3d 723 (Colo. App. 2000) (3-month notice requirement under § 12 of FAA is not subject to equitable tolling).

[33] See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) (unless statutory time limitation is jurisdictional, law typically treats statute of limitations defense as affirmative defense that must be raised or is waived). Cf. *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015).

[34] See, e.g., Kristen M. Blankley, *A Uniform Theory of Federal Court Jurisdiction Under the Federal Arbitration Act*, 23 Geo. Mason L. Rev. 525 (2016).

[35] *Vaden v. Discover Bank*, 556 U.S. 49, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009).

explained that the "'body of federal substantive law'" generated by the FAA is "equally binding on state and federal courts"[36] but:

> "As for jurisdiction over controversies touching arbitration," however, the [FAA] is "something of an anomaly" in the realm of federal legislation: It "bestow[s] no federal jurisdiction but rather requir[es] [for access to a federal forum] an independent jurisdictional basis" over the parties' dispute. . . . Given the substantive supremacy of the FAA, but the [FAA's] nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate.[37]

The Karos filed their application for judicial vacatur in state court rather than federal court, so we are not concerned here with questions of federal court jurisdiction. Rather, the threshold question presented is whether the 3-month time limit under § 12 of the FAA is jurisdictional in nature, such that it cannot be waived and courts must consider the issue sua sponte even when the parties do not raise it.[38]

#### (a) Framework Under Federal Law for Determining When Statutory Time Limits Are Jurisdictional

Because the question presented requires this court to interpret federal law, we look to federal court decisions for guidance. The U.S. Supreme Court has, in recent years, endeavored to "'bring some discipline'" to its "use of the term 'jurisdictional'" due to what it described as its "'less than meticulous' use of the term in the past."[39] Generally speaking, it has done so by attempting to distinguish between those statutory time

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[36] *Id.*, 556 U.S. at 59.

[37] *Id.*

[38] See, *John R. Sand & Gravel Co., supra* note 33; 9 U.S.C. § 12.

[39] *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012).

limits which are merely "'claim-processing rules'" and those which affect a court's "'adjudicatory authority'" and thus are jurisdictional.[40]

Over the past decade or so, the Court has granted certiorari in several cases to determine whether statutory time limitations were jurisdictional and, in most of those cases, concluded they were not.[41] The Supreme Court has observed that "[m]ost statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims" and for that reason, "the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver."[42] The Court has described these ordinary statutory filing deadlines as "'quintessential claim processing rules'" which "'seek to promote the orderly process of litigation,' but do not deprive a court of authority to hear a case."[43] Alternatively, when statutory time limitations "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader

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[40] *Id.*

[41] Compare, e.g., *U.S. v. Kwai Fun Wong*, 575 U.S. 402, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015) (statutory requirement that suit under Federal Tort Claims Act be filed within 6 months after claim denied by federal agency is not jurisdictional); *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013) (180-day filing deadline for filing appeals to Medicare's Provider Reimbursement Review Board is not jurisdictional); and *Henderson v. Shinseki*, 562 U.S. 428, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011) (120-day deadline for filing notice of appeal seeking de novo review before Board of Veterans' Appeals is not jurisdictional), with *John R. Sand & Gravel Co., supra* note 33 (6-year statutory limitation on filing claims before U.S. Court of Federal Claims is jurisdictional and cannot be waived); *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007) (statutory time limits for taking appeal in civil case are mandatory and jurisdictional).

[42] *John R. Sand & Gravel Co., supra* note 33, 552 U.S. at 133.

[43] *Kwai Fun Wong, supra* note 41, 135 S. Ct. at 1632 (quoting *Henderson, supra* note 41).

system-related goal," they more often are considered jurisdictional in nature.[44]

The Court has "urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction."[45] But the Court has also recognized that even where a statutory time limitation appears to be a claim-processing rule, it may nevertheless be jurisdictional because "Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule."[46] The Court has acknowledged that "[w]hile perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice."[47]

[5] To make it easier for courts applying federal law to determine whether statutory time limits are jurisdictional, the U.S. Supreme Court has recently adopted what it refers to alternatively as the "clear statement rule"[48] or the "'bright line'" rule.[49] In *Sebelius v. Auburn Regional Medical Center*,[50] the Court explained the rule as follows:

> To ward off profligate use of the term "jurisdiction," we have adopted a "readily administrable bright line" for determining when to classify a statutory limitation as jurisdictional. . . . We inquire whether Congress has "clearly state[d]" that the rule is jurisdictional; absent such a clear statement, we have cautioned, "courts should treat the restriction as nonjurisdictional

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[44] *John R. Sand & Gravel Co., supra* note 33, 552 U.S. at 133.

[45] *Henderson, supra* note 41, 562 U.S. at 435.

[46] *Id.*

[47] *Reed Elsevier, Inc., supra* note 27, 559 U.S. at 161.

[48] *Kwai Fun Wong, supra* note 41, 575 U.S. at 410. See, also, *Gonzalez, supra* note 39.

[49] *Sebelius, supra* note 41, 568 U.S. at 153.

[50] *Sebelius, supra* note 41.

> in character." . . . This is not to say that Congress must incant magic words in order to speak clearly. We consider "context, including this Court's interpretations of similar provisions in many years past," as probative of whether Congress intended a particular provision to rank as jurisdictional.[51]

With these principles in mind, we review the statutory language of the FAA for any clear indication that Congress intended the statutory time limits on serving notice of an application for expedited judicial review to be jurisdictional.

### (b) Congress Intended Notice Requirements Under §§ 9 and 12 to Be Jurisdictional

As noted, the FAA authorizes parties to an arbitration to apply for expedited judicial review of arbitration awards seeking either to confirm the award,[52] vacate the award,[53] or modify the award.[54] The notice requirements for judicial confirmation are set out in § 9 of the FAA and the notice requirements for judicial vacatur and modification are set out in § 12.[55] Under both §§ 9 and 12, it is mandatory that notice of any application be served on the adverse party, and the manner in which notice must be served is the same. Only the time period for serving the required notice is different—those applying for judicial confirmation may do so anytime within 1 year after the award,[56] and those applying for judicial vacatur or modification must do so within 3 months after the award is filed or delivered.[57]

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[51] *Id.*, 568 U.S. at 153-54 (citations omitted).

[52] 9 U.S.C. § 9.

[53] *Id.*, § 10.

[54] *Id.*, § 11.

[55] *Id.*, §§ 9 and 12.

[56] *Id.*, § 9.

[57] *Id.*, § 12.

Section 9, which is titled "Award of arbitrators; confirmation; jurisdiction; procedure," provides in pertinent part:

> [A]ny time within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. . . . *Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding.* If the adverse party is a resident of the district in which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.[58]

Section 9 provides that an application for judicial confirmation "may" be filed anytime within 1 year after an award appears, and this language has caused federal courts to split over whether the 1-year time period is mandatory or permissive.[59] But here, we are not concerned with interpreting the requirements for timely filing applications to confirm awards. Rather, we look to the language of § 9 for instruction, if any, on whether Congress considered the notice requirements attendant to the streamlined process for judicial review to be mandatory and jurisdictional in nature.

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[58] *Id.*, § 9 (emphasis supplied).

[59] See Teresa L. Elliott, *Conflicting Interpretations of the One-Year Requirement on Motions to Confirm Arbitration Awards*, 38 Creighton L. Rev. 661 (2005) (analyzing split in federal courts over whether 9 U.S.C. § 9 allows parties to seek judicial confirmation of award more than 1 year after award is entered).

Section 9 requires that notice of any application for judicial confirmation "shall be served upon the adverse party" and "shall be made" in the manner provided, and it then expressly provides that "thereupon," after service of such notice, "the court shall have jurisdiction" over the adverse parties to the arbitration. This is a clear indication that Congress intended the statutory requirements for serving notice of an application for expedited judicial review under the FAA to be jurisdictional in nature. And while it is tempting to think about the FAA's notice requirements using traditional notions of personal jurisdiction, we are not persuaded that the general jurisprudence governing obtaining and waiving personal jurisdiction in federal court actions has any proper application to the sort of streamlined judicial review Congress authorized under the FAA.

Both the title and the statutory language of § 9 indicate that Congress intended compliance with the notice requirement to carry jurisdictional consequence. This makes practical sense, because expedited judicial review under the FAA gets "streamlined treatment as a motion"[60] and thus is not subject to the formal process or time restrictions on serving complaints. The FAA's requirement of serving notice of an application on the adverse party is the only procedure governing movement of the case from the arbitral forum to the judicial forum.

[6] We conclude, based on the clear statutory language of § 9, that the notice requirements governing judicial review under the FAA are intended to "govern[] a court's adjudicatory capacity"[61] and properly are termed jurisdictional. We next consider whether the same can be said for the 3-month time limit under § 12.

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[60] See *Hall Street Associates, L. L. C., supra* note 12, 552 U.S. at 582. See, also, 9 U.S.C. § 6 ("[a]ny application to the court [under the FAA] shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided").

[61] *Henderson, supra* note 41, 562 U.S. at 435.

Under § 12, Congress used mandatory language to set out both the notice requirements and the timeframe for serving such notice. That section requires that notice of an application seeking judicial vacatur "must be served upon the adverse party or his attorney within three months after the award is filed or delivered." Although Congress did not, in § 12, repeat the phrase from § 9 that "thereupon the court shall have jurisdiction" when addressing notice under § 12, we conclude it is appropriate to analyze §§ 9 and 12 together when considering the effect of the jurisdictional language.

We are mindful that the U.S. Supreme Court has counseled against restrictively "parsing the language" when comparing similar provisions of the sections governing judicial review under the FAA.[62] In *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*,[63] the Court considered whether differences in the permissiveness of the venue language used in § 9 (judicial confirmation) could be reconciled with the more mandatory venue language used in §§ 10 and 11 (judicial vacatur and modification). There, a unanimous Court held that the language of §§ 10 and 11 should be read to "supplement, but . . . not supplant" the permissive language of § 9, reasoning that these sections "are best analyzed together, owing to their contemporaneous enactment and the similarity of their pertinent language."[64] The Court noted some of the practical problems that would result from construing the venue requirements differently for judicial confirmation and vacatur, and it ultimately concluded that permissive venue was more consistent with the FAA's "'statutory policy of rapid and unobstructed enforcement of arbitration agreements.'"[65] We assume the same interpretive reasoning applies here.

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[62] *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000).

[63] *Cortez Byrd Chips, Inc., supra* note 62.

[64] *Id.*, 529 U.S. at 198.

[65] *Id.*, 529 U.S. at 201.

Although different timeframes apply for serving notice under §§ 9 and 12, there is no difference in the mandatory process by which the adverse party must be served with notice of the application, and no difference in the practical purpose for requiring such notice. It would make little sense for Congress to give clear jurisdictional weight to serving notice in one context but not the other, and we see nothing in the language or purpose of the FAA that would compel the conclusion that Congress intended the statutory notice requirements for expedited judicial review to be jurisdictional when a party seeks judicial confirmation, but not when a party seeks judicial vacatur or modification. Even though § 9 governs judicial confirmation, it expressly references vacating, modifying, or correcting awards "as prescribed in sections 10 and 11 of this title"[66] before stating the jurisdictional impact of serving notice of applications for judicial review. Due to the similarity of the mandatory notice procedures, we analyze §§ 9 and 12 together, and we conclude that whether an arbitrating party is applying for judicial review to confirm an award under § 9 or to vacate or modify an award under §§ 10 and 11, Congress intended that a party's failure to serve notice of the application in the manner directed, and within mandatory time limits, would have jurisdictional consequences.

(c) Context and Purpose of § 12 Indicate It Is Jurisdictional

Our conclusion that Congress intended the 3-month time limit under § 12 to be jurisdictional is supported by more than just the presence of clear jurisdictional language in § 9. The U.S. Supreme Court has directed that in addition to considering whether Congress used language clearly stating that a time limitation is jurisdictional, courts should consider "'context, including this Court's interpretations of similar provisions in many years past,'" as probative of

[66] 9 U.S.C. § 9.

whether Congress intended a particular provision to rank as jurisdictional.[67]

In discussing the purpose of the time limit in § 12, the Second Circuit Court of Appeals reasoned:

> The role of arbitration as a mechanism for speedy dispute resolution disfavors delayed challenges to the validity of an award. . . . Thus, when a party to an arbitration believes that he has been prejudiced in the proceedings by behavior that the [FAA] condemns he must bring a motion to vacate within the allotted time. When the three month limitations period has run without vacation of the arbitration award, the successful party has a right to assume the award is valid and untainted, and to obtain its confirmation in a summary proceeding.[68]

Under the FAA, state and federal courts have only an ancillary role in the arbitration process. The U.S. Supreme Court has described judicial review under §§ 9 through 11 of the FAA as

> substantiating a national policy favoring arbitration with just the limited [judicial] review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process" . . . .[69]

[7] Under the FAA, once the arbitrator has heard a case and entered an award, Congress has placed strict limitations on judicial review of the arbitration award by placing temporal limits on when a court is authorized to review an award[70] and

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[67] *Sebelius, supra* note 41, 568 U.S. at 153-54.

[68] *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 177 (2d Cir. 1984) (citation omitted).

[69] See *Hall Street Associates, L. L. C., supra* note 12, 552 U.S. at 588.

[70] See, e.g., 9 U.S.C. §§ 9 and 12.

by limiting the grounds upon which a court is authorized to vacate or modify such an award.[71] In that regard, the streamlined judicial review of an arbitrator's award is similar to restricted appellate review, and we conclude it is appropriate to view the timely notice requirements governing judicial review in that context as well.

Before addressing the law which has developed around the jurisdictional nature of notices of appeal, we pause to acknowledge that the streamlined motion process which Congress adopted for expedited judicial review of arbitration awards is procedurally unique and resists easy application of the settled jurisprudence that federal courts apply in both actions and appeals. Traditional concepts of subject matter jurisdiction, personal jurisdiction, and appellate jurisdiction are strained by the FAA's streamlined procedure for judicial review of arbitrations. But until the U.S. Supreme Court weighs in on this issue, we find it necessary to draw from the settled jurisprudence governing those traditional concepts in order to resolve the jurisdictional questions which are not answered in the sparse provisions of the FAA.

[8] Unlike statutes of limitation that govern filing actions in the trial courts, statutory time limits on appellate review are almost always considered jurisdictional in nature, both historically and presently, and strict compliance with such time limits is necessary.[72] The U.S. Supreme Court recognized as much in *Bowles v. Russell.*[73]

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[71] See, *id.*, §§ 10 and 11; *Hall Street Associates, L. L. C., supra* note 12.

[72] See, generally, 4 C.J.S. *Appeal and Error* § 361 (2007). See, also, *Henderson, supra* note 41, 562 U.S. at 438 ("time for taking an appeal from a district court to a court of appeals in a civil case has long been understood to be jurisdictional"); *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013) (appellate courts do not generally acquire jurisdiction of appeal unless notice of appeal is filed and docket fee is paid within 30 days of final order).

[73] *Bowles, supra* note 41.

[9] In *Bowles*, the Court considered whether the statutory time limit for filing a notice of appeal in a habeas action was jurisdictional. The district court had denied habeas relief and then gave the petitioner additional time in which to file his notice of appeal. According to federal statute, a notice of appeal must be filed within 30 days of entry of judgment,[74] and district courts have limited authority to grant motions to reopen the time to file an appeal for a period of 14 days.[75] The district court purported to reopen the filing period for more than 14 days. Because of this, the Court of Appeals found the notice of appeal was untimely filed and concluded it lacked jurisdiction over the appeal. The Supreme Court granted certiorari, and affirmed. The Court acknowledged that several of its recent opinions had undertaken to clarify the distinction between jurisdictional rules and claims-processing rules, but pointed out that "none of them calls into question our long-standing treatment of statutory time limits for taking an appeal as jurisdictional."[76] The Court went on to explain:

> Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in §2107(c), that limitation is more than a simple "claim-processing rule." As we have long held, when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction."[77]

Like the time-sensitive notice-of-appeal requirements considered jurisdictional in *Bowles*, the notice requirements that govern judicial review under the FAA are "more than a simple 'claim-processing rule.'"[78] Like notices of appeal, the notice

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[74] See 28 U.S.C. § 2107(a) (2012).

[75] See *id.*, § 2107(c).

[76] *Bowles, supra* note 41, 551 U.S. at 210.

[77] *Id.*, 551 U.S. at 213.

[78] *Id.*

requirements for judicial review under the FAA play a critical role in the orderly movement of the case between forums in a multiforum system.

[10] The concept of jurisdiction—in its most essential form—has been described as "erect[ing] both the fences that separate forums and the gates that cases may pass through."[79] The FAA's requirement that one seeking judicial vacatur must serve notice of the application in a certain manner and within a specified timeframe, like the notice of appeal considered jurisdictional in *Bowles*, is the statutory procedure that defines which forum has authority over the dispute. Because it "'delineat[es] the classes of cases'" the court may review, it is properly considered jurisdictional.[80] Indeed, if the notice requirements under § 12 are not considered jurisdictional in nature, then we see nothing else in the FAA which purports to govern the movement of a case from the arbitral forum into the judicial forum for purposes of judicial vacatur or modification under §§ 10 and 11.

### (d) 3-Month Notice Requirement Is Jurisdictional

[11] For all these reasons, we conclude that the 3-month notice requirement of § 12 is jurisdictional in nature and that the Karos' failure to comply with the requirement deprived the district court of authority under the FAA to vacate the arbitration award under § 10. While expedited judicial review under § 10(a) of the FAA may not be the only way to bring an arbitration award before the courts,[81] it was the only ground relied upon by the Karos in seeking vacatur, and we express no opinion about other possible avenues for judicial enforcement of this award.

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[79] Scott Dodson, *Jurisdiction and Its Effects*, 105 Geo. L.J. 619, 634 (2017).

[80] *Reed Elsevier, Inc., supra* note 27, 559 U.S. at 160.

[81] See *Hall Street Associates, L. L. C., supra* note 12, 552 U.S. at 590 (noting §§ 10 and 11 of FAA are "not the only way into court for parties wanting review of arbitration awards").

[12,13] When a court lacks jurisdiction and nonetheless enters an order, such order is void.[82] "'[A] void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on [a] court.'"[83] Because the district court lacked jurisdiction to enter a judgment vacating the arbitration award under the FAA, its judgment is void and NAU's appeal from such judgment cannot confer appellate jurisdiction upon this court. Accordingly, we do not reach the other jurisdictional and legal issues briefed by the parties.

## V. CONCLUSION

For the foregoing reasons, we vacate the district court's judgment and dismiss this appeal for lack of jurisdiction.

Vacated and dismissed.

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[82] *Anderson v. Finkle*, 296 Neb. 797, 896 N.W.2d 606 (2017).

[83] *Id.* at 802-03, 896 N.W.2d at 611.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Jamos M. Jasa, appellant.

901 N.W.2d 315

Filed September 22, 2017. No. S-16-989.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law which an appellate court resolves independently of the lower court's conclusion.
3. **Constitutional Law: Search and Seizure: Investigative Stops: Arrests: Probable Cause.** The Fourth Amendment guarantees the right to be free of unreasonable search and seizure. This guarantee requires that an arrest be based on probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity.
4. **Criminal Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** A traffic stop requires only that the stopping officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime.
5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a traffic violator, the stop is objectively reasonable.
6. ____: ____: ____: ____. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
7. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct—although such

correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm.

8. **Blood, Breath, and Urine Tests: Drunk Driving: Evidence: Proof.** The four foundational elements which the State must establish as a foundation for the admissibility of a breath test in a driving under the influence prosecution are as follows: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) that all other statutes were satisfied.
9. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
10. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
11. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

Brad Roth, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

## INTRODUCTION

Following a jury trial, Jamos M. Jasa appeals his conviction and sentence for aggravated driving under the influence (DUI), third offense, a Class IIIA felony under Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197.03(6) (Cum. Supp. 2014). Jasa challenges the order of the district court for Lancaster County that denied his motion to suppress the

results of a chemical breath test. We conclude that the district court did not err in finding that law enforcement (1) had reasonable suspicion to initiate a traffic stop, (2) administered a 15-minute observation period prior to the chemical breath test in accordance with title 177 of the Nebraska Administrative Code, and (3) complied with Neb. Rev. Stat. § 60-6,199 (Reissue 2010) by allowing access to a telephone to arrange independent testing. Therefore, we affirm.

## BACKGROUND

On February 14, 2015, Jasa was the subject of a traffic stop, which led to a DUI investigation and a chemical breath test showing an alcohol concentration of .191 grams of alcohol per 210 liters of Jasa's breath. The State charged Jasa pursuant to §§ 60-6,196 and 60-6,197.03(6) with DUI, third offense, while having a breath alcohol concentration of .15 grams of alcohol per 210 liters of breath, or more.

Prior to trial, Jasa moved to suppress his chemical breath test result on several grounds. In relevant part, he alleged (1) that law enforcement officers lacked reasonable suspicion or probable cause to stop his vehicle, making any evidence obtained as a result of the stop inadmissible; (2) that the chemical breath test was not conducted in compliance with title 177 of the Nebraska Administrative Code, because law enforcement officers failed to properly and continuously monitor him for 15 minutes prior to the breath test; and (3) that Jasa was prohibited from obtaining independent testing of his alcohol concentration, which rendered his breath test result inadmissible under § 60-6,199.

At the hearing on Jasa's motion to suppress, the evidence established that on February 14, 2015, shortly after midnight, Officers Kenneth Morrow and Jonathan Sears of the Lincoln Police Department were on patrol together when they received a dispatch about a vehicle that was "all over the road" at First and West O Streets in Lincoln, Nebraska. The dispatch center received the initial report from an employee

of Lincoln Fire and Rescue (LFR). The report originated from LFR "Engine 3," which is based at a firehouse near First and West O Streets.

Morrow and Sears arrived in the area within a few minutes. At approximately Third and West O Streets, they saw a pickup that matched the description and the license plate number provided by LFR.

Morrow testified that they observed the pickup weaving in its lane and saw both the front and rear driver's side tires completely cross over the dashed lane divider line. The district court received into evidence Lincoln Mun. Code § 10.14.110 (1990), which prohibits a motorist's vehicle from straddling the lane line with its wheels for a distance greater than required to safely change lanes.

Morrow testified that after seeing the pickup cross the lane line with its driver's side tires, he activated his cruiser camera, which was able to "jump back . . . 10 seconds on the video." A copy of the resulting video was received at the suppression hearing. Morrow testified that the video shows the pickup weaving within its lane and then crossing the lane line. Due to the quality of the video, lighting, and movement, the lane line is difficult to discern during portions of the video; however, it does appear that the pickup weaved in its lane and could have briefly crossed the lane line with both driver's side tires. Morrow acknowledged that the quality of the video was "not great," but stated that from his perspective, he was able to see the driver's side tires cross the lane line. After perceiving this traffic violation, the officers initiated a traffic stop and identified the pickup's driver as Jasa.

Morrow testified that Jasa's driving behaviors were consistent with someone who is under the influence of alcohol and that he administered field sobriety tests and a preliminary breath test at the scene of the traffic stop. Jasa was ultimately arrested for DUI.

While detained in the police cruiser, Jasa twice requested a blood test. Morrow testified that the officers could have taken

Jasa to a hospital for a chemical blood test. Instead, the officers transported Jasa to the Lancaster County jail for a chemical breath test. They arrived at the jail at 1:04 a.m.

While Sears prepared for the breath test, Morrow accompanied Jasa to a different room where Jasa changed into a jail uniform. Morrow observed Jasa for 15 minutes prior to the chemical breath test, monitoring him for belching, vomiting, or anything that would bring alcohol from his stomach to his mouth and affect the accuracy of the test. Morrow testified that he observed none of these behaviors.

Sears testified that he was aware that the 15-minute observation had taken place but that Morrow did not directly communicate with Sears about his observations. Sears explained that sometimes, when two officers conduct a DUI investigation, one officer carries out the observation period while the other administers the chemical test, but that normally, the subject sits beside the testing machine for the 15-minute observation period.

Morrow testified that he explained the chemical breath test process to Jasa, and Sears testified that he, Sears, completed the steps necessary to administer the test. At some point, Morrow filled out "Attachment 16," a "checklist technique . . . approved and prescribed" by title 177 of the Nebraska Administrative Code. The checklist requires the following tasks: verify the testing instrument's maintenance, "[o]bserve the subject for 15 minutes prior to testing," record the time the observation began, attach a clean mouthpiece, verify that a complete breath sample was obtained with no errors, and indicate the alcohol content of the breath sample obtained. The bottom of the form includes a line above the words "Permit Holder." Morrow checked the box next to each task on the form, filled in the necessary information, and identified Sears as the permit holder. Morrow testified that normally, the officer who administers the breath test is identified as the permit holder. Morrow and Sears both had Class B permits to operate the testing instrument.

Sears administered the chemical breath test at 1:22 a.m. Both Morrow and Sears were present. The test indicated that Jasa had a breath alcohol concentration of .191 grams of alcohol per 210 liters of breath.

Immediately after the chemical breath test, Morrow read Jasa a "physician's advisement," which informed Jasa that under § 60-6,199, he had a right to undergo independent testing but would have to procure and pay for it himself. Morrow further explained to Jasa that Jasa would have to ask someone to come to the jail to perform an independent test. Jasa asked how he could arrange such testing, and Morrow informed him that he would be allowed to use the telephone and would have to speak with the jail staff for further details. Additionally, Morrow told Jasa that he would have to remain in jail until his court date 3 days later.

Jasa was cited for aggravated DUI, third offense, a felony. Morrow testified that Jasa had to be lodged in jail because his offense was not bondable. Sears explained that the offense was not bondable because Jasa was arrested during the weekend and a judge could not set bond for several days.

Both Morrow and Sears testified that neither of them did anything to inhibit Jasa's ability to arrange independent testing. Morrow stated that inmates at the Lancaster County jail are allowed to make telephone calls and to have visitors. Both officers testified that they could not recall anyone ever coming to the jail to administer an independent blood test, but Morrow pointed out that he did not "stick with the people down at the jail" and that, in his role as a police officer, he would never see an arrestee receiving a visitor and did not know how the process worked.

Jasa testified that Morrow and Sears did not offer to transport him to the hospital for a blood test or to have someone come to the jail for a blood test, nor did they provide any information that he could use to obtain a blood test. Jasa confirmed that he was told he could arrange blood testing on his own, but said he had no idea whom to call or how to arrange

such testing at 2 a.m., especially since he is not from Lincoln. However, Jasa acknowledged that he used to live in Lincoln and had access to a telephone while he was in jail on the night of his arrest.

Over the 3½ days that Jasa spent in jail for the present offense, he made 45 telephone calls. The evidence showed that at 1:56 a.m. on the night of his arrest, he first called his current attorney, but was unsuccessful in reaching him. Jasa testified that he also called his brother and a friend several times to attempt to arrange for bond so that he could obtain an independent test upon his release and because, he testified, he did not realize he was nonbondable until several hours after his incarceration. Jasa acknowledged that, while in jail, he never attempted to contact a physician, a hospital, or anyone else to obtain a blood test.

Jasa testified that on the morning of the suppression hearing, he called several places in Lincoln to inquire whether they perform independent blood tests at the jail: the main desk, the laboratory, and the emergency room at a Lincoln hospital; the laboratory and the emergency room at another Lincoln hospital; and two other testing facilities, as well as the Lancaster County Detention Center's medical department. Jasa testified that one of the hospitals had referred him to the two other testing facilities. Jasa stated that he made his best effort to find a facility that would draw blood at the jail and that he spoke to about 15 people, but he did not obtain the names of the employees who fielded his calls. Jasa testified that each facility informed him that it does not come to the jail to perform independent blood tests.

The district court denied Jasa's motion to suppress. First, while the district court made the factual finding that Morrow observed Jasa's pickup weaving within his lane and crossing over the lane line with the driver's side tires, the district court ultimately relied on the observation of weaving alone, along with LFR's report, in determining that the traffic stop was justified by reasonable suspicion of criminal activity. Second,

the district court concluded that it was not improper under title 177 for the officers to "work[] together" to observe Jasa during the 15-minute period prior to the breath test. Further, the district court reasoned that even if the officers did not strictly comply with the 15-minute observation requirement, the 15-minute observation period is a "'technique'" rather than a "'method'" under title 177, and that thus, any deficiency in executing it would affect credibility, but not admissibility. Finally, the district court concluded that suppression of the breath test was not warranted under § 60-6,199 because, although the officers did not assist Jasa in obtaining independent testing, law enforcement personnel did not intentionally impede his ability to do so.

After overruling Jasa's motion to suppress, the district court conducted a jury trial. The district court received evidence of the chemical breath test result over Jasa's timely objections and overruled his renewed motion to suppress. The jury found Jasa guilty of DUI with an alcohol concentration of .15 or more.

The district court held an enhancement hearing and determined the current conviction to be Jasa's third DUI offense. The district court sentenced Jasa to 36 months' probation with various terms and conditions and 60 days in jail with credit for time served. Further, the district court revoked Jasa's operator's license for 5 years, with the possibility of obtaining an ignition interlock device after 45 days.

This appeal followed.

## ASSIGNMENTS OF ERROR

Jasa assigns that the district court erred in (1) finding reasonable suspicion to initiate the stop, (2) finding that the 15-minute observation period prior to the breath test had been properly executed pursuant to title 177, (3) finding no violation of § 60-6,199, and (4) not suppressing the breath test and allowing it to be offered into evidence.

## STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *State v. McCumber*, 295 Neb. 941, 893 N.W.2d 411 (2017).

[2] The meaning and interpretation of statutes and regulations are questions of law which an appellate court resolves independently of the lower court's conclusion. *State v. McIntyre*, 290 Neb. 1021, 863 N.W.2d 471 (2015).

## ANALYSIS

### Legal Basis for Traffic Stop

[3-5] Jasa asserts that the officers did not have a legal basis to stop his vehicle. He contends that LFR's tip and the officers' independent observations were insufficient to create reasonable suspicion. The Fourth Amendment guarantees the right to be free of unreasonable search and seizure. *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014). This guarantee requires that an arrest be based on probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity. *Id.* A traffic stop requires only that the stopping officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. *Id.* In this context, if an officer has probable cause to stop a traffic violator, the stop is objectively reasonable. *Id.*

[6] A police officer has probable cause to stop a defendant's vehicle, independent of an anonymous tip, when the officer observes a traffic violation. See *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014). A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.

*Id.* In reviewing a challenge to the legality of an automobile stop, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation; instead, a stop of a vehicle is objectively reasonable when the police officer has probable cause to believe that a traffic violation has occurred. *Id.*

Here, Jasa claims that the traffic stop was not justified because he did not commit a traffic violation under § 10.14.110 of the Lincoln Municipal Code. That section of the code prohibits driving with "one front and rear wheel . . . on one side of [the lane] line and the other front and rear wheel . . . on the opposite side of the [lane] line for a distance more than is necessary to change from one traffic lane to the other with safety." Specifically, Jasa claims that his vehicle "did not straddle the [lane] line with both tires at the same time as required under the code." Brief for appellant at 18.

The State contends that Jasa committed a traffic violation which provided probable cause for the traffic stop. To support its position, the State first notes the district court's factual finding that Morrow observed Jasa's vehicle "weaving within his lane and at one point crossing over the lane line with the driver's side tires." Despite this factual finding by the district court, in its holding, the court relied upon the call from dispatch and Jasa's vehicle weaving within the lane as reasonable suspicion for the traffic stop. The State requests that we accept these factual findings, because on appeal, we review a trial court's factual findings for a motion to suppress based on a claimed violation of the Fourth Amendment for clear error. See *State v. McCumber*, 295 Neb. 941, 893 N.W.2d 411 (2017). Although the video is not entirely clear, Morrow testified that from his perspective, he observed both driver's side tires cross the lane line. We find it was not clearly erroneous for the district court to accept Morrow's testimony on this issue.

[7] Next, based upon these facts, the State argues that we should find probable cause for the traffic stop based upon a

violation of the law. And we do independently review whether the facts violate the Fourth Amendment protections as a question of law. See *State v. McCumber, supra*. With the district court's having found that Morrow observed both of Jasa's driver's side wheels cross the lane line, it was objectively reasonable to conclude that a traffic violation had occurred. Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm. *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009). Therefore, we find no error by the district court in concluding that reasonable suspicion justified the traffic stop.

## Administration of Breath Test Pursuant to Title 177

[8] Jasa next disputes the admissibility of the chemical breath test results. The four foundational elements which the State must establish as foundation for the admissibility of a breath test in a DUI prosecution are as follows: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) that all other statutes were satisfied. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). Jasa's contentions focus on the third foundational element.

Title 177 is the governing Department of Health and Human Services regulation in this case. Title 177 authorizes Class B permit holders to perform a chemical test to analyze a subject's breath for alcohol content using an approved method. See 177 Neb. Admin. Code, ch. 1, § 001.07B (2014). Title 177 further sets forth the "Operating Rules for Class B Permit," and provides, "To determine the alcohol content in breath, a Class B permit holder shall . . . [u]se the appropriate checklist . . . ." 177 Neb. Admin. Code, ch. 1, §§ 007.02 and 007.02B (2014).

Under title 177, the testing machine used here is among the "[a]pproved evidentiary breath testing methods and instruments . . ." for which the "[c]hecklist technique . . ." in attachment 16 is approved and required. 177 Neb. Admin. Code, ch. 1, §§ 008.01, 008.01A, and 008.01C (2014). As described above, attachment 16 consists of a checklist of tasks including, among other things, "[o]bserve the subject for 15 minutes prior to testing." At the bottom of the checklist is a line with the words "Permit Holder" underneath.

Here, Morrow observed Jasa for 15 minutes before Sears, the named permit holder, administered the chemical breath test. Jasa claims that the breath test was not properly conducted under the methods stated by the Department of Health and Human Services in title 177, because Sears failed to observe Jasa for 15 minutes prior to administering the test and instead relied upon Morrow's 15-minute observation of Jasa. Further, Jasa contends that Sears could not rely on the knowledge of another officer to satisfy the observation period required by attachment 16 of title 177, because he and Morrow did not discuss the 15-minute observation period conducted by Morrow before Sears administered the breath test.

Jasa points to *DeBoer v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 760, 761, 751 N.W.2d 651, 654 (2008), where the Nebraska Court of Appeals referred to the checklist as a "form by regulation [that] must be completed by an officer when conducting a breath test." But that descriptive phrase occurred only in the background section of that particular opinion and was not part of the Court of Appeals' holding in *DeBoer*. Although it may be typical, and even the best practice, for one officer both to administer the breath test and to complete the checklist, title 177 does not require that one officer perform both duties.

In this instance, competent evidence at the suppression hearing established that each requirement of attachment 16 had been performed. Morrow, a Class B permit holder, testified that he personally observed Jasa for the entire 15-minute

observation period and perceived nothing that would affect the accuracy of the test administered by Sears. Morrow further verified that he was present for the breath test and completed attachment 16, which shows that each foundational requirement had been met; and other than addressing the manner of executing the 15-minute observation period, Jasa presented no evidence or arguments to challenge the form's validity. Based on this evidence, we conclude the district court did not err in admitting the chemical breath test result, despite Jasa's assertions that it lacked sufficient foundation under title 177.

We digress to note the district court's finding that even if the officers had not strictly complied with title 177, the breath test results were admissible, because the 15-minute observation period was a technique rather than a method, and, as such, any failure to strictly adhere to it affected only the weight and credibility of the evidence, not its admissibility. In reaching this conclusion, the district court cited *State v. Miller*, 213 Neb. 274, 281, 328 N.W.2d 769, 773 (1983), where we stated, "[f]ailure to comply with a technique is not a failure to prove a foundational element, but affects weight and credibility only." Jasa, however, argues that the analysis in *Miller* does not apply in this instance, because *Miller* analyzed a prior rule of the then Department of Health's rules and regulations, rather than title 177. Further, Jasa contends that under title 177, "methods" and "techniques" are intertwined and thus, no distinction between the two should apply here.

In reaching our conclusion in *Miller*, we distinguished between method and technique, as those terms were expressly defined in the prior rule. But before arriving at that distinction, we stated that in order to admit the results of a chemical test, the statutory foundation must be met. We determined that such foundation was satisfied, and not until later in the opinion did we undertake the discussion of "method" and "technique" to address a requested jury instruction that invited the jury to assess the admissibility of the evidence. Therefore, the key question is whether the State proved that the express

requirements of the Department of Health and Human Services have been fulfilled, and here, we have answered that question in the affirmative. Having thus concluded, we need not delve into any distinction between methods and techniques.

### Opportunity for Independent Chemical Test/Admissibility Under § 60-6,199

Next, Jasa claims that the district court erred when it found that the officers had not violated his statutory right to an independent blood test pursuant to § 60-6,199. Section 60-6,199 provides:

> The peace officer who requires a chemical blood, breath, or urine test or tests pursuant to section 60-6,197 may direct whether the test or tests shall be of blood, breath, or urine. The person tested shall be permitted to have a physician of his or her choice evaluate his or her condition and perform or have performed whatever laboratory tests he or she deems appropriate in addition to and following the test or tests administered at the direction of the officer. If the officer refuses to permit such additional test to be taken, then the original test or tests shall not be competent as evidence. Upon the request of the person tested, the results of the test or tests taken at the direction of the officer shall be made available to him or her.

In *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995), we applied the language of § 60-6,199, then codified as Neb. Rev. Stat. § 39-669.09 (Cum. Supp. 1992). We found that an officer had no statutory duty to transport an in-custody defendant to the hospital for an independent blood test. In *Dake*, we also endorsed the view that while "the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test." 247 Neb. at 584, 529 N.W.2d at 49.

Here, Jasa requested the opportunity to undergo an independent blood test, and Morrow informed him that jail staff

would allow him access to the telephone to make the necessary arrangements. Jasa's access to the telephone began at approximately 2 a.m., shortly after officers administered the chemical breath test, but, despite making 45 telephone calls, he did not try to contact a hospital or physician. Instead, he attempted, unsuccessfully, to make arrangements for bond.

On the morning of the suppression hearing, Jasa called hospitals and other entities to inquire about a blood test. Jasa testified that he learned that no entity he contacted comes to the jail to conduct independent blood tests. Notably, Jasa did not identify any of the individuals who fielded his calls, nor, as the State points out, does this evidence categorically establish that Jasa could not have been tested at the jail. It merely shows that Jasa's "best efforts" on the morning of the suppression hearing were fruitless.

In the instant case, Jasa was provided telephone access, but, whether through misunderstanding or calculated choice, he did not use it to arrange for timely independent testing. Even if confusion about bond influenced Jasa's failure to arrange for a timely independent blood test, any such misfortune did not arise due to the fault of law enforcement, who advised him that he would remain in jail until his court date and that he would have to arrange for someone to administer a blood test at the jail. See *People v. Kirkland*, 157 Misc. 2d 38, 595 N.Y.S.2d 905 (1993) (if driver cannot obtain test, through no fault of police, it is generally considered driver's misfortune). Instead, the officers in this case fulfilled the requirements of § 60-6,199 as applied in *Dake*: They did not hamper Jasa's ability to obtain an independent test, and they assisted him by allowing him to make telephone calls to secure it.

Despite Jasa's failure to attempt to arrange for a timely independent test, he argues that our holding in *State v. Dake, supra*, is distinguishable from his situation because he later attempted to contact hospitals and other entities about an independent blood test and none of them performed such tests at the jail. He also claims *Dake* is distinguishable because he

could not bond out for 3 days, whereas the defendant in *Dake* bonded out within a few hours. Under the circumstances in this case, Jasa believes that the intent of § 60-6,199 is defeated if the officers are not required to do more than provide access to a telephone.

Jasa relies on cases from other jurisdictions. He cites *State v. Hedges*, 143 Idaho 884, 154 P.3d 1074 (Idaho App. 2007). But in *Hedges*, an Idaho court held that "the police . . . have a duty not to interfere with or affirmatively deny a defendant access to a telephone once a request has been made to make telephonic arrangements for an independent [blood alcohol content (BAC)] test," but "no duty to administer a second BAC test or otherwise participate in arranging an independent BAC test on behalf of the defendant" and no duty to "transport a defendant to a medical facility to obtain an independent BAC test." 143 Idaho at 888, 154 P.3d at 1078.

Jasa also points to *Unruh v. State*, 669 So. 2d 242, 243-44 (Fla. 1996), where the Supreme Court of Florida found:

> [L]aw enforcement must render reasonable assistance in helping a DUI arrestee obtain an independent blood test upon request. In some cases, minimal aid such as providing access to a telephone and directory will be sufficient; in others, more active assistance such as transporting the arrestee to a blood testing facility will be necessary.

However, unexplained by Jasa, is what would constitute reasonable assistance if we adopted the holding in *Unruh v. State, supra*. For example, does the officer need to assist an extremely intoxicated person who cannot even conduct a telephone call, does the officer order medical personnel to conduct an independent test if they refuse, and who is liable for the costs or if an injury occurs? Adopting any standard beyond allowing a defendant to make his or her own arrangements would add requirements to § 60-6,199 which are not present and would lead to confusion for law enforcement and medical personnel and inconsistencies in applying the law. See *State*

*v. Rodriguez*, 288 Neb. 714, 850 N.W.2d 788 (2014) (it is not within appellate court's province to read meaning into statute that is not there).

[9,10] In this instance, even if we ignored Jasa's failure to timely attempt to arrange for an independent test, it would not obviate the fact that the principle of *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995), comports with § 60-6,199. Statutory language is to be given its plain and ordinary meaning. *State v. Arizola*, 295 Neb. 477, 890 N.W.2d 770 (2017). And we will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous. *State v. Wood*, 296 Neb. 738, 895 N.W.2d 701 (2017). Clearly, § 60-6,199 allows any "person tested . . . to have a physician . . . evaluate his or her condition and perform or have performed whatever laboratory tests he or she deems appropriate." But the officer must "refuse[] to permit"—that is, deny authorization or consent for—such additional test to trigger the suppression of any officer-directed test. Since our holding in *Dake* over two decades ago, our Legislature has not revisited the language in § 60-6,199. The principle that "the police cannot hamper a motorist's efforts to obtain independent testing" and "are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test" is still a reasonable statement of the law. *State v. Dake*, 247 Neb. at 584, 529 N.W.2d at 49**.** Accordingly, the district court did not err in finding no violation of the statutory rights afforded to Jasa by § 60-6,199.

[11] Jasa further claims a violation of his due process rights because he was denied the opportunity to obtain exculpatory evidence through an independent blood test. However, he did not raise this issue before the district court, and in appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006). Therefore, we will not consider this issue on appeal.

## Sufficiency of Evidence

Jasa argues that if we conclude that the district court erred in denying his motion to suppress, the evidence at trial was insufficient to support his conviction for the crime charged. However, having found that the district court did not err in denying the motion to suppress, we need not consider this assignment of error. *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

## CONCLUSION

For the reasons set forth above, we affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Jared S. Hoerle, appellant.

901 N.W.2d 327

Filed September 22, 2017. No. S-16-1003.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Search and Seizure.** Application of the good faith exception to the exclusionary rule is a question of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
4. **Drunk Driving: Blood, Breath, and Urine Tests.** A court must consider the totality of the circumstances to determine whether a driver's consent to a blood test was freely and voluntarily given.
5. **Constitutional Law: Search and Seizure: Evidence.** The Fourth Amendment does not expressly preclude the use of evidence obtained in violation of its commands.
6. ____: ____: ____. The exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.
7. ____: ____: ____. A Fourth Amendment violation does not necessarily mean that the exclusionary rule applies.
8. **Courts: Search and Seizure.** Because the exclusionary rule should not be applied to objectively reasonable law enforcement activity, the U.S. Supreme Court created a good faith exception to the rule.
9. **Constitutional Law: Courts: Search and Seizure: Police Officers and Sheriffs: Evidence.** A court may decline to apply the exclusionary rule when evidence is obtained pursuant to an officer's objective and reasonable reliance on a law that is not clearly unconstitutional at the time.

Appeal from the District Court for Lancaster County: Jodi Nelson, Judge. Affirmed.

Mark E. Rappl for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

## INTRODUCTION

One day after Jared S. Hoerle's conviction for driving under the influence (DUI), the U.S. Supreme Court held that a blood test may not be administered without a warrant as a search incident to an arrest for DUI.[1] Hoerle moved for a new trial, arguing that it was error to admit the result of a warrantless test of his blood. The district court overruled the motion, and Hoerle appeals. Because we determine that the good faith exception to the exclusionary rule applies, we affirm the court's denial of a new trial.

## BACKGROUND

A motorist called the 911 emergency dispatch service after witnessing Hoerle wreck his motorcycle. An officer responding to the scene observed clues that Hoerle may be impaired by alcohol, and Hoerle admitted consuming alcoholic beverages. Based on the result of a preliminary breath test, the officer determined that he needed Hoerle to submit to a chemical test. A phlebotomist at a hospital obtained blood from Hoerle at the officer's request.

The State charged Hoerle with "DUI- .15+ (2 prior convictions)." At trial, the parties stipulated that the blood test

[1] See *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

showed a blood alcohol concentration of .195 gram of alcohol per 100 milliliters of blood. A jury returned a verdict finding Hoerle guilty of DUI and found that the State proved Hoerle had a concentration of .150 of 1 gram or more by weight of alcohol per 100 milliliters of blood. The district court proceeded with an enhancement hearing and found Hoerle guilty of DUI over .15 with two prior convictions.

The following day, the U.S. Supreme Court released its decision in *Birchfield v. North Dakota*.[2] In that case, the Court considered "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream."[3] The Court held that the Fourth Amendment permits a warrantless breath test as a search incident to a lawful arrest for drunk driving, but does not allow a warrantless blood test as a search incident to arrest. The Court also touched on whether a blood test is permissible based on a driver's statutory implied consent and stated that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."[4]

Hoerle timely moved for a new trial. He detailed that the officer (1) acquired his blood sample without a warrant, (2) stated Hoerle was required to submit to a chemical blood test, and (3) told Hoerle refusal to submit to such test was a separate crime for which Hoerle may be charged. Hoerle claimed that in light of the new rule of constitutional law announced in *Birchfield*, the introduction of evidence regarding his blood alcohol constituted an error of law and the guilty verdict was not sustained by sufficient admissible evidence.

The district court held a hearing on the motion for new trial at which the arresting officer testified. The officer testified

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[2] *Id.*

[3] *Id.*, 579 U.S. at 454.

[4] *Id.*, 579 U.S. at 477.

that he was denied permission to use the breath-testing facility at the jail due to concerns as to whether Hoerle was "fit for confinement" as a result of the accident. The officer then transported Hoerle to a hospital so that Hoerle's medical condition could be checked. Because the officer was already at the hospital and in order to preserve as much evidence as possible, he decided "to get everything done at the hospital, one shot." The officer read Hoerle the postarrest chemical test advisement form which advised that "refusal to submit to [the chemical test] is a separate crime for which you may be charged." The officer testified that Hoerle cooperated with his request for a blood sample and did not resist in any way. The officer did not attempt to obtain a warrant for the blood draw, because his knowledge at that time was that a warrant was not needed. The court overruled the motion.

After the district court imposed a sentence, Hoerle filed this appeal. We granted the State's petition to bypass review by the Nebraska Court of Appeals.

## ASSIGNMENT OF ERROR

Hoerle assigns that the district court abused its discretion by denying his motion for new trial.

## STANDARD OF REVIEW

[1-3] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[5] Application of the good faith exception to the exclusionary rule is a question of law.[6] On a question of law, an appellate court reaches a conclusion independent of the court below.[7]

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[5] *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016).

[6] *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014).

[7] *State v. Muhannad*, 290 Neb. 59, 858 N.W.2d 598 (2015).

## ANALYSIS

### *Birchfield v. North Dakota*

We begin with a brief review of *Birchfield*. The opinion addressed the consolidated cases of three individuals: one who refused a blood test, another who refused a breath test, and a third who submitted to a blood test after being told that the law required submission. Because Hoerle similarly submitted to a blood test after being read the postarrest chemical test advisement, we focus on the third individual's case.

Steven Michael Beylund agreed to have his blood drawn after he was informed that under North Dakota's implied consent advisory, refusing the blood test would itself be a crime punishable in the same manner as DUI and may result in a revocation of driving privileges for a minimum of 180 days and up to 3 years. Beylund's driver's license was thereafter suspended for 2 years after an administrative hearing, and he appealed from that decision. Although Beylund's case concerned an administrative license proceeding rather than a criminal proceeding, the *Birchfield* Court stated that "if such warrantless searches are constitutional, there is no obstacle under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding."[8]

The *Birchfield* Court then turned to the issue of consent. The Court stated that "[i]t is well established that a search is reasonable when the subject consents . . . and that sometimes consent to a search need not be express but may be fairly inferred from context . . . ."[9] But Beylund argued that his consent was coerced by the officer's warning that refusing the blood test would itself be a crime. The Court distinguished implied-consent laws that impose civil penalties from those imposing criminal penalties:

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[8] *Birchfield v. North Dakota, supra* note 1, 579 U.S. at 455.

[9] *Id.*, 579 U.S. at 476.

> Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . [N]othing we say here should be read to cast doubt on [those laws].
>
> It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.[10]

The Court stated that in applying the reasonableness standard, "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."[11]

But the Court ultimately did not resolve the consent issue as a matter of law. Instead, the *Birchfield* Court remanded Beylund's cause to the state court to reevaluate Beylund's consent given the officer's partial inaccurate advisory that the State could permissibly compel both blood and breath tests. In doing so, the Court noted that "voluntariness of consent to a search must be 'determined from the totality of all the circumstances.'"[12]

*Birchfield* called into question the voluntariness of a motorist's consent to a blood test when the motorist is advised that refusal will result in a criminal charge. But it is unclear whether *Birchfield* created a categorical rule that consent given after threat of criminal prosecution is per se involuntary. The Court's remand suggests that it did not.

Following *Birchfield*, state appellate courts have taken different paths. One court determined that a warrantless blood draw could not be upheld based on consent after the driver was informed that failure to submit constituted a separate

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[10] *Id.*, 579 U.S. at 476-77.

[11] *Id.*, 579 U.S. at 477.

[12] *Id.*, 579 U.S. at 478.

crime.[13] Another court followed the lead of *Birchfield* and remanded the cause to the trial court for a reevaluation of consent.[14] Other courts have considered the totality of the circumstances to determine whether the driver's consent was freely and voluntarily given.[15]

[4] We conclude that *Birchfield* does not make categorically invalid a warrantless blood draw based on actual consent when a driver is incorrectly advised that the driver is required to submit to such a test or will face criminal penalties for a refusal. Rather, a court must consider the totality of the circumstances to determine whether a driver's consent to a blood test was freely and voluntarily given.

In the case before us, the timing dictated an unusual procedure. Because the *Birchfield* decision came after completion of the trial, there was no opportunity for a motion to suppress. Instead, the consent issue was presented through a motion for new trial. The district court made no express factual findings. No one asserts error to the lack of such findings.

Although we could discern implicit factual findings regarding consent, before doing so another course deserves our attention. If the good faith exception to the exclusionary rule applies to pre-*Birchfield* blood draws, we can resolve the appeal on that basis.

## Exclusionary Rule and Good Faith Exception

[5-7] The Fourth Amendment does not expressly preclude the use of evidence obtained in violation of its commands.[16]

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[13] See *State v. Schmidt*, 53 Kan. App. 2d 225, 385 P.3d 936 (2016).

[14] See *Commonwealth v. Evans*, 153 A.3d 323 (Pa. Super. 2016).

[15] See, *People v. Mason*, 8 Cal. App. 5th Supp. 11, 214 Cal. Rptr. 3d 685 (2016); *State v. Charlson*, 160 Idaho 610, 377 P.3d 1073 (2016); *State v. Blackman*, 377 Wis. 2d 339, 898 N.W.2d 774 (2017).

[16] See, *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

The exclusionary rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'"[17] Thus, a Fourth Amendment violation does not necessarily mean that the exclusionary rule applies.[18]

[8] Because the exclusionary rule should not be applied to objectively reasonable law enforcement activity, the U.S. Supreme Court created a good faith exception to the rule.[19] We have followed suit and applied the good faith exception in a number of cases.[20]

*Birchfield* did not directly address whether the good faith exception to the exclusionary rule should apply in a situation where consent to a blood test is given following an incorrect advisement that refusal could be criminally punished. But the State draws guidance from the following footnote:

> If the court on remand finds that Beylund did not voluntarily consent, it will have to address whether the evidence obtained in the search must be suppressed when the search was carried out pursuant to a state statute, see *Heien v. North Carolina*, . . . 135 S.Ct. 530, 537-539, 190 L.Ed.2d 475 (2014), and the evidence is offered in an administrative rather than criminal proceeding, see *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363-364, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). And as Beylund notes, remedies may be available to him under state law.[21]

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[17] *United States v. Leon, supra* note 16, 468 U.S. at 906.

[18] See *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015).

[19] See *United States v. Leon, supra* note 16.

[20] See, e.g., *State v. Tyler, supra* note 18; *State v. Henderson, supra* note 16; *State v. Hill, supra* note 6; *State v. Bromm*, 285 Neb. 193, 826 N.W.2d 270 (2013); *State v. Nuss*, 279 Neb. 648, 781 N.W.2d 60 (2010).

[21] *Birchfield v. North Dakota, supra* note 1, 579 U.S. at 478 n.9.

The State's argument focuses on the first case cited in the footnote. In *Heien v. North Carolina*,[22] the Court held that an officer's mistake of the law was reasonable and that thus, there was reasonable suspicion justifying the stop under the Fourth Amendment. Because there was no Fourth Amendment violation, the *Heien* Court did not need to consider the appropriate remedy.

The other case cited in the footnote involved application of the exclusionary rule. In *Pennsylvania Bd. of Probation and Parole v. Scott*,[23] the Court recognized that it had "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials." Ultimately, the Court held that "parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment."[24]

Although neither of the majority opinions mentioned the good faith exception, the *Birchfield* Court's juxtaposition of the two cases is significant. One case held that a stop was lawful because the officer's mistake as to the law was reasonable. The other case, in discussing whether the exclusionary rule should apply in a noncriminal proceeding, emphasized that use of the rule is unwarranted where its deterrence benefits would not outweigh its social costs. Together, these cases do not foreclose application of the good faith exception where the Fourth Amendment violation was due to an officer's reasonable mistake of law.

[9] A court may decline to apply the exclusionary rule when evidence is obtained pursuant to an officer's objective and reasonable reliance on a law that is not clearly unconstitutional at the time. The U.S. Supreme Court declared

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[22] *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014).

[23] *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998).

[24] *Id.*, 524 U.S. at 369.

that the exclusionary rule did not apply to evidence obtained by police who acted in objectively reasonable reliance on a statute authorizing warrantless administrative searches, but which was subsequently found to violate the Fourth Amendment.[25]

The Court explained the underlying rationale:

> The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter further Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.[26]

Applying this rationale, we discern no deterrent value in suppressing the results of Hoerle's blood test. The officer advised Hoerle that refusal to submit to a chemical test was a separate crime for which he may be charged, an advisement required by the statute.[27] And the statute was not clearly unconstitutional at the time of Hoerle's arrest in April 2015.

Following *Birchfield*, state courts are not uniform as to whether the good faith exception to the exclusionary rule should apply. At least two states have adopted the good faith

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[25] See *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987).

[26] *Id.*, 480 U.S. at 349-50.

[27] See Neb. Rev. Stat. § 60-6,197(5) (Cum. Supp. 2016).

exception.[28] And at least two states have determined that the exception did not apply.[29]

We are not persuaded by the reasoning of the courts declining to apply the exception. Each advanced a different rationale, which we discuss separately.

The Arizona Supreme Court reasoned that an officer should have known that a departmental practice of directing blood draws from DUI suspects, without making a case-specific determination whether a warrant could be timely secured, was either impermissible or at least constitutionally suspect.[30] But it seems to us that law enforcement officers are generally tasked with enforcing the law as written, and it would be unwise to expect them to make their own judgment calls as to the constitutionality of such statutes. The U.S. Supreme Court cogently stated:

> Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.[31]

The Wisconsin Supreme Court feared that if it did not suppress the evidence, officers would continue to read the incorrect advisory form to others in order to provide the basis for

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[28] See, *State v. Schmidt, supra* note 13; *State v. Reynolds*, 504 S.W.3d 283 (Tenn. 2016).

[29] See, *State v. Havatone*, 241 Ariz. 506, 389 P.3d 1251 (2017); *State v. Blackman, supra* note 15.

[30] See *State v. Havatone, supra* note 29.

[31] *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

voluntary consent.[32] But as the dissent pointed out, an officer who did so after release of the majority opinion would be unable to rely on the good faith exception.[33] To us, the Wisconsin dissent seems more persuasive.

Because the officer here acted in objectively reasonable reliance on a statute that had not been found unconstitutional at the time, excluding the results of Hoerle's blood test would not serve the purpose of the exclusionary rule. We conclude that the good faith exception applies to warrantless pre-*Birchfield* blood draws.

## CONCLUSION

Because we conclude that the good faith exception applies to warrantless blood draws conducted prior to the U.S. Supreme Court's decision in *Birchfield*, we find no abuse of discretion by the district court in overruling Hoerle's motion for new trial.

Affirmed.

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[32] See *State v. Blackman, supra* note 15.

[33] See *id.* (Roggensack, C.J., dissenting).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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# State of Nebraska, appellee, v. Joseph A. Gill, appellant.

901 N.W.2d 679

Filed September 22, 2017. No. S-16-1063.

1. **Judgments: Speedy Trial: Appeal and Error.** Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **Pleadings: Limitations of Actions: Final Orders: Appeal and Error.** A ruling on a motion to quash on the ground that the charges of the information are allegedly outside the statute of limitations is not a final, appealable order as defined by Neb. Rev. Stat. § 25-1902 (Reissue 2016), no matter how the motion was denominated.
4. **Jurisdiction: Final Orders: Appeal and Error.** An appeal from a final order may raise every issue presented by the order that is the subject of the appeal, but appellate jurisdiction does not extend to issues not presented by the final order.
5. ____: ____: ____. An appellate court cannot address on appeal issues that do not bear on the correctness of the final order upon which its appellate jurisdiction is based.
6. **Pleadings: Final Orders: Appeal and Error.** A litigant cannot gain interlocutory review of an issue that does not affect a substantial right by surreptitiously joining it to a motion that otherwise results in a final order.
7. **Speedy Trial: Motions for Continuance: Waiver.** The definite or indefinite nature of a requested continuance is irrelevant to the applicability of the waiver set forth in the amended language of Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 2016).

Appeal from the District Court for Saunders County: Mary C. Gilbride, Judge. Affirmed.

Mark A. Steele, of Steele Law Office, for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Wright, J.

## NATURE OF CASE

This case presents an appeal from the denial of the defendant's motion for absolute discharge. The defendant and the State dispute whether defendant's motion to continue the trial date outside the statutory 6-month period constituted a permanent waiver, under Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 2016), of the statutory speedy trial right. Alternatively, they dispute what periods of delay were attributable to the State or to the defendant.

## BACKGROUND

On November 9, 2015, Joseph A. Gill was charged with seven counts of first degree sexual assault, see Neb. Rev. Stat. § 28-319(1)(a) (Reissue 2016), and two counts of incest, see Neb. Rev. Stat. § 28-703 (Reissue 2016). Counts I through III alleged sexual assault on or about September 21, 1996, to June 10, 2002, on T.H., born in 1989. Count IV alleged sexual assault on T.H. on or about September 21, 1997, to September 20, 1998. Count V alleged sexual assault on T.H. on or about September 21, 1998, to September 2, 2002, and count VI alleged sexual assault on T.H. on or about June 3 to 10, 2002.

Count VII alleged incest with T.H. on or about September 21, 1996, to June 10, 2002.

Count VIII alleged sexual assault on K.A., born in 1998, on or about January 1, 2005, to December 31, 2006. Lastly,

count IX alleged incest with K.S., born in 1998, on or about January 1, 2005, to December 31, 2006.

On November 16, 2015, Gill moved to quash the information on the ground that the charges were time barred under Neb. Rev. Stat. § 29-110 (Reissue 2016).

Section 29-110(8) currently provides that there is no statute of limitations for charges of incest and first degree sexual assault of a child. Prior to an amendment in 2005, however, the statute of limitations for first degree sexual assault of a child was 7 years from the date of the offense or within 7 years after the victim's 16th birthday, whichever was later.[1] The 2005 amendment explicitly applies to offenses committed before September 4, 2005, for which the statute of limitations had not expired as of September 4, 2005, as well as to offenses committed on or after that date.[2]

And it was not until 2009 that the Legislature added the crime of incest to its list of crimes in § 29-110(8) that are without any time limitations for prosecution or punishment.[3] This 2009 amendment applies to offenses committed before May 21, 2009, for which the statute of limitations had not expired as of that date, as well as to offenses committed on or after May 21, 2009.[4] Before the effective date of the 2009 amendment, incest was governed by the general 3-year statute of limitations.[5]

The court ruled on the motion to quash on February 4, 2016. The court concluded that the charges of sexual assault in counts I through V were timely brought because the statute of limitations on these charges had not yet expired as of September 4, 2005. Likewise, the court found that count VIII

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[1] 2005 Neb. Laws, L.B. 713.

[2] See § 29-110(14).

[3] 2009 Neb. Laws, L.B. 97.

[4] See § 29-110(15).

[5] § 29-110(1) (Reissue 2008).

was timely brought. The court sustained Gill's motion to quash as to count VII. The court also partially sustained Gill's motion to quash as to count IX, to the extent the crime was alleged to have occurred before May 21, 2006.

Gill was rearraigned on the first eight charges on March 21, 2016, with the incest charge that was previously count IX described as count VIII. Apparently, no amended information had been filed. Trial was set for July 13.

On June 20, 2016, Gill orally moved to continue trial for the reason that he had not completed taking depositions. The court granted the motion. As a result of the continuance, trial was set for September 14. Gill did not object to the new trial date.

On July 6, 2016, the State obtained a continuance because the victim for counts VII and VIII was pregnant, with a due date of September 13. The State conceded in its motion that Gill would not consent to the continuance. At the hearing on the motion, defense counsel stated that he understood the situation and "would just ask the Court . . . if [it's] going to grant the State's motion to continue, that it be a short one." The court granted the continuance and set a new trial date for October 12.

On October 11, 2016, the State applied for and was given leave to amend the information, over Gill's objection. The amended information omitted the ninth charge, that the court had previously ordered quashed and which was omitted in the description of the charges when Gill was rearraigned. And the amended information corrected the date of what was newly designated as "count VIII," in order to conform to the court's prior order finding that the charge was timely brought only to the extent it alleged acts occurring before May 21, 2006. The principal purpose of the amended information, however, was to add facts supporting habitual criminal enhancement of the potential sentences. Except for changes made to conform to the court's prior order partially granting Gill's motion to quash and the addition of the habitual criminal

allegations, the amended information was the same as the original information.

At the hearing on the State's motion to amend the information, defense counsel stated that he would not be ready to proceed the next day for the scheduled trial on the amended information; he needed a reasonable opportunity to look it over and discuss the enhanced penalties with Gill. The court granted defense counsel what the court characterized as a request for additional time, and it set a new trial date for November 16, 2016. Defense counsel did not object at the hearing to the new trial date.

On November 4, 2016, Gill again filed a motion to quash,[6] on the ground that counts I through VI stated in the information were time barred. At the hearing, defense counsel explained that he was renewing his motion on the statute of limitations in order to preserve the issue for trial. Also on November 4, Gill filed a separate motion for absolute discharge based on the alleged violations of both his statutory[7] and constitutional rights to a speedy trial.

The court issued an order on November 14, 2016. The court stated in its order that the matters to be addressed were Gill's two motions, but it ultimately explicitly ruled only on the motion for absolute discharge. There appears in the record no ruling on the November 4 motion to quash, and nothing in the record demonstrates that Gill insisted on a ruling.

Relying on our interpretation of § 29-1207(4)(b) in *State v. Hettle*[8] and *State v. Mortensen*,[9] the district court found that Gill had made a permanent and unequivocal waiver of his statutory right to a speedy trial by requesting a continuance that

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[6] See Neb. Rev. Stat. § 29-1808 (Reissue 2016). See, also, e.g., *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[7] § 29-1207.

[8] *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014).

[9] *State v. Mortensen*, 287 Neb. 158, 841 N.W.2d 393 (2014).

extended the trial date beyond the statutory 6-month period. Section 29-1207(4)(b) states in relevant part that "[a] defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period."

Alternatively, the court found that without such a permanent waiver, the total period of delay attributable to the State was still only 168 days. The court did not explicitly address Gill's constitutional speedy trial right, but generally denied the motion for absolute discharge. Gill filed this appeal within 30 days of the November 14, 2016, order.

## ASSIGNMENTS OF ERROR

Gill assigns that the district court erred in (1) denying his motion for absolute discharge insofar as it alleged that he was not brought to trial within the statutory time period under § 29-1207, (2) denying his motion for absolute discharge insofar as it alleged that he was denied his constitutional right to a speedy trial, and (3) failing to consider Gill's motion to quash due to the failure of the State to file the information within the statutory time period from the date of the alleged offenses.

## STANDARD OF REVIEW

[1] Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[10]

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[11]

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[10] *State v. Hood*, 294 Neb. 747, 884 N.W.2d 696 (2016).

[11] *Id.*

## ANALYSIS

### Appellate Jurisdiction

Neb. Rev. Stat. § 25-1911 (Reissue 2016) limits appellate jurisdiction to a judgment rendered or final order. Without a conviction and sentence, there has not yet been a judgment rendered below[12]; thus, we consider the extent to which we are presented with a final order.

The only type of final order potentially present here is "an order affecting a substantial right made in a special proceeding."[13] We have held many times that a ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is a ruling affecting a substantial right made during a special proceeding and is therefore final and appealable.[14] Absolute discharge provided for by Neb. Rev. Stat. § 29-1208 (Reissue 2016) bestows a right not to be tried equivalent to that of the Double Jeopardy Clause.[15] Such a right would not be effectively vindicated in an appeal after the trial has taken place.[16] The parties do not dispute the applicability of these propositions to the court's order denying absolute discharge.

[3] But the State correctly points out that a ruling on a motion to quash on the ground that the charges of the information are allegedly outside the statute of limitations is not a final, appealable order as defined by § 25-1902, no matter how the motion was denominated.[17] As explained in *State v.*

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[12] See, Neb. Rev. Stat. § 25-1301(1) (Reissue 2016); *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980); *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974).

[13] Neb. Rev. Stat. § 25-1902 (Reissue 2016).

[14] *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

[15] See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

[16] See *id*.

[17] See *State v. Loyd, supra* note 6.

*Loyd*,[18] the statutes of limitations do not set forth a remedy of absolute discharge. We have concluded that, in contrast to speedy trial or double jeopardy claims,[19] a ruling on the statute of limitations does not affect a substantial right.[20]

Also, the order presently being appealed does not actually contain a ruling on Gill's motion to quash. The court implicitly rejected Gill's constitutional speedy trial argument in denying his motion for absolute discharge that raised both statutory and constitutional speedy trial arguments. But in its November 14, 2016, order concluding that Gill was not entitled to absolute discharge, the court did not implicitly reject Gill's statute of limitations argument that was raised in a separate motion to quash.

While Gill alternatively asserts it was error for the court to fail to address his second motion to quash, the onus is on the movant to insist upon a ruling below before bringing the issue to the appellate courts.[21] Moreover, even if, in the face of a defendant's insistence, a court refuses to rule on the merits of a motion, the court's refusal to rule would be no more final than a ruling on the motion would have been.

[4-6] An appeal from a final order may raise every issue presented by the order that is the subject of the appeal, but our appellate jurisdiction does not extend to issues not presented by the final order.[22] We cannot address on appeal issues that do not bear on the correctness of the final order upon which our appellate jurisdiction is based.[23] A litigant cannot gain interlocutory review of an issue that does not affect a substantial right by surreptitiously joining it to a motion that

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[18] *Id.*

[19] See *State v. Gibbs, supra* note 14.

[20] *Id.*

[21] See, e.g., *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006).

[22] See *id.*

[23] See *id.*

otherwise results in a final order.[24] A determination of the statute of limitations has no bearing on the correctness of a speedy trial determination.

The November 14, 2016, order upon which our appellate jurisdiction is based did not dispose of the statute of limitations issue, and even if it had, the portion of the order addressing the statute of limitations would not be final for purposes of this interlocutory appeal. Accordingly, we do not have jurisdiction to consider Gill's assignment of error pertaining to his motion to quash.

## Statutory Right to Speedy Trial

We turn first to Gill's statutory right to a speedy trial. The trial court's primary reason for rejecting Gill's motion for discharge based on his statutory right to a speedy trial was that pursuant to § 29-1207(4)(b), Gill had permanently waived his statutory right to a speedy trial by asking for a continuance that resulted in extending a trial date beyond the statutory 6-month period. Although the order does not specify, it is clear from the record it refers to Gill's June 20, 2016, motion.

Section 29-1207(4) generally sets forth the periods to be excluded in computing the time for trial. Section 29-1207(4)(b) concerns continuances granted at the request or with the consent of the defendant. That subsection has long provided that the period of delay resulting from a continuance granted at the request of the defendant is excluded in computing the time for trial.

But before 2010, the delay caused by a continuance was never a permanent waiver of the right to a speedy trial. Rather, the delay caused by the continuance granted for the defendant was simply excluded from the 6-month period and counted against the defendant.[25]

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[24] *State v. Loyd, supra* note 6.

[25] See *State v. Wells*, 277 Neb. 476, 763 N.W.2d 380 (2009).

In 2010, the Legislature added the following language to § 29-1207(4)(b) (Cum. Supp. 2010):

> A defendant who has sought and obtained a continuance which is indefinite has an affirmative duty to end the continuance by giving notice of request for trial or the court can end the continuance by setting a trial date. When the court ends an indefinite continuance by setting a trial date, the excludable period resulting from the indefinite continuance ends on the date for which trial commences. A defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period.

This language, particularly the language pertaining to continuances that extend the trial date beyond the statutory 6-month period, was added in direct response to concerns about the statutory scheme expressed by the concurring opinion in *State v. Williams*.[26]

In *Williams*, we affirmed the denial of absolute discharge after a complicated analysis of motions by the State and the defendant that delayed trial for nearly 4 years.[27] Defense motions, many of them motions for continuances, resulted in 1,242 days of excludable time. The concurring opinion pointed out the flaw of a statutory scheme that allows for multiple lengthy delays by the defense, which can be strategically made in the hopes that the State will lose sight of the speedy trial calculations.[28]

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[26] *State v. Williams, supra* note 15 (Wright, J., concurring; Heavican, C.J., and Connolly, J., join). See, also, *State v. Mortensen, supra* note 9; Judiciary Committee Hearing, L.B. 1046, 101st Leg., 2d Sess. 15-16 (Feb. 19, 2010).

[27] See *State v. Williams, supra* note 15.

[28] *Id.* (Wright, J. concurring; Heavican, C.J., and Connolly, J., join).

If the State lost sight of the speedy trial clock, then the defendant was entitled under the statutory scheme to absolute discharge based on a simple mathematical computation and no showing of actual prejudice. The concurring opinion explained, "Similar to the crocodile that followed 'Captain Hook,' time keeps following the State, and the accused hopes the State will slip and fall victim to the 6-month trial clock."[29]

The concurring opinion in *Williams* suggested that this abuse could be prevented through an amendment to the speedy trial statutes providing that once a defendant extends the trial date beyond the required 6 months, he or she shall be deemed to have waived the statutory 6-month trial requirement.[30] The concurrence explained that in such circumstances, the defendant would still be protected by the constitutional right to a speedy trial, with its four-part balancing test that includes a determination of whether the defendant was actually prejudiced.[31]

Thus, § 29-1207(4)(b) (Reissue 2016) now states that "[a] defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period." We explained the meaning of this amended language in *Mortensen*.[32] We said that it provides for a "permanent waiver of the statutory right to a speedy trial."[33] "[R]eading § 29-1207(4)(b) as a whole, if a defendant requests a continuance that moves a trial date which has been set within the

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[29] *Id.* at 148, 761 N.W.2d at 527 (Wright, J., concurring; Heavican, C.J., and Connolly, J., join).

[30] See *State v. Williams, supra* note 15 (Wright, J. concurring; Heavican, C.J., and Connolly, J., join).

[31] See, *id.*; *United States v. MacDonald*, 435 U.S. 850, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978).

[32] *State v. Mortensen, supra* note 9.

[33] *Id.* at 165, 841 N.W.2d at 400.

statutory 6-month period to a date that is outside the 6-month period," that request "constitutes a permanent waiver of the statutory speedy trial right."[34] We further said that the "broad language" of § 29-1207(4)(b) "does not specify the reasons for which a continuance must be granted in order to result in a waiver of the statutory right to a speedy trial."[35]

We reasoned, "There is no language in the statute that indicates an intent to limit the scope of the waiver provided therein, and 'an appellate court will not "read into a statute a meaning that is not there."'"[36] We approved of such a broad and permanent waiver as a means of curtailing the abuse by defense motions for continuance criticized in *Williams*.[37] In this regard, we noted that the speedy trial statutes do not protect the interests of just the defendant. They also protect the government and the public's interest in bringing the accused to trial at an early date. "A primary purpose of the statutes is to promote a speedy trial, not to delay it."[38]

Much of our opinion in *Mortensen* addressed our conclusion that defense motions to discharge, which must be addressed by the trial court and necessitate an adjournment while being resolved by an interlocutory appeal, are requests for continuances even though not denominated as such.[39] Applying this holding to the facts in *Mortensen*, we found that the defendant's motion to discharge resulted in continuing the trial beyond the statutory 6-month period. Thus, the defendant had permanently waived his statutory right to a speedy trial and the exact calculation of days remaining on the speedy trial clock was no longer required.

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[34] *Id*.

[35] *Id.* at 167, 841 N.W.2d at 401.

[36] *Id.* at 165, 841 N.W.2d at 400.

[37] See *State v. Williams, supra* note 15 (Wright, J., concurring; Heavican, C.J., and Connolly, J., join).

[38] *State v. Mortensen, supra* note 9, 287 Neb. at 169, 841 N.W.2d at 402.

[39] See *State v. Mortensen, supra* note 9.

In *State v. Vela-Montes*,[40] we were again confronted with the waiver language of § 29-1207(4)(b) in the context of a delay due to a motion for absolute discharge resulting in a trial date outside of the 6-month period. The motion for discharge, which under *Mortensen* was considered a motion to continue, was filed when there were only 17 days remaining on the speedy trial clock, as calculated up to that point with excludable periods under § 29-1207. We found that as of the time of our opinion, the continuance was still in effect pending resolution of the appeal and had moved the trial well beyond the 17 days remaining when the defendant filed the motion. Because the motion to continue resulted in extending the trial beyond the statutory 6-month period, as calculated on the date the motion was filed, the defendant had waived the statutory speedy trial right and no further examination of days on the speedy trial clock was required.

Gill argues that the trial court erred in concluding that he had permanently waived his statutory right to a speedy trial because his request for a continuance was for a definite period rather than indefinite. Further, Gill asserts that the trial court's ruling has the absurd result that "any affirmative action or filing by a criminal defendant would constitute a permanent waiver."[41] We find no merit to these arguments.

Gill filed a motion to continue, not just any motion. The period of delay resulting from other proceedings such as hearings on competency, motions to quash, motions to suppress evidence, motions for change of venue, demurrers or pleas in abatement is described in § 29-1207(4)(a), not § 29-1207(4)(b). There is no language in § 29-1207(4)(a) regarding a permanent waiver of the right to a speedy trial.

Furthermore, permanent waiver occurs only when the 6-month period, as calculated up to that date with excludable periods, has been exceeded by virtue of the motion. The

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[40] *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014).

[41] Brief for appellant at 14.

court's ruling that Gill waived his right to a speedy trial in no way implies that any filing by a defendant would permanently waive the statutory right to a speedy trial.

There is nothing in the language of § 29-1207(4)(b) that would suggest that only indefinite continuances extending the trial date beyond the statutory 6-month period permanently waive the statutory right to a speedy trial. While § 29-1207(4)(b) was amended to add language pertaining to indefinite continuances at the same time that it was amended to add the language pertaining to permanent waiver, the two sentences are not directly related.

By its plain language, the sentence pertaining to indefinite continuances clarifies when the excludable period resulting from the indefinite continuance ends. In contrast, the permanent waiver set forth in the last sentence of § 29-1207(4)(b) does not concern excludable periods except to the extent they are implicitly part of the 6-month trial date calculated at the time of a motion to continue.[42] The waiver sentence at issue in this case refers to "a continuance granted at the request of the defendant or his or her counsel."[43] There is no modifier limiting the waiver to indefinite continuances as opposed to definite continuances. As we have said many times, we will not read into a statute a meaning that is not there.[44]

Likewise, our opinions in *Williams*, *Mortensen*, and *Vela-Montes* do not suggest that only indefinite continuances extending the trial date beyond the statutory 6-month period permanently waive the statutory right to a speedy trial.[45] We can find no logical reason why indefinite continuances would be treated differently from definite continuances for this purpose. The defendant waives the statutory 6-month

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[42] See *State v. Vela-Montes, supra* note 40.

[43] § 29-1207(4)(b).

[44] See, e.g., *State v. Mortensen, supra* note 9.

[45] See, *State v. Vela-Montes, supra* note 40; *State v. Mortensen, supra* note 9; *State v. Williams, supra* note 15.

period when he or she requests a continuance that extends the trial date beyond the statutory 6-month period. Once the defendant does that, the statutory clock is gone. This permanent waiver is designed to prevent the abuse illustrated in *Williams*, where the State remained bound to vigilance of the strictly mathematical speedy trial clock during years of repeated motions by the defendant to continue. That kind of abuse occurred no less through definite than through indefinite continuances.

[7] We held in *Mortensen* that the reason for the continuance is irrelevant to whether the defendant has waived the statutory right to a speedy trial under the amended language of § 29-1207(4)(b). We now hold that the definite or indefinite nature of a requested continuance is irrelevant to the applicability of the waiver set forth in the amended language of § 29-1207(4)(b).

When Gill moved to continue trial on June 20, 2016, the 6-month speedy trial clock was set to have run on July 27. To calculate the 6-month clock, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4).[46] Excludable periods attributable to a motion begin on the day immediately after the filing and end on the date of final disposition.[47] Absent any excludable periods, the 6-month clock would have run on May 9, 2016. Seventy-nine excludable days attributable to Gill's motion to quash on November 16, 2015, are added to this date.

Gill agreed pursuant to his motion that trial would be rescheduled to September 14, 2016, 49 days beyond the statutory 6-month period ending July 27, as calculated on the date Gill filed the motion to continue. Thus, Gill permanently waived his statutory right to a speedy trial.

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[46] See *State v. Williams, supra* note 15.

[47] *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002); *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980).

We find no error in the trial court's factual calculation that Gill requested a continuance that extended the trial date beyond the statutory 6-month period. And we agree with the trial court's legal conclusion that under § 29-1207(4)(b), Gill thereby permanently waived his statutory right to a speedy trial.

## Constitutional Right to Speedy Trial

We consider Gill's constitutional right to a speedy trial. As we said in *Williams*, a defendant who has permanently waived his or her statutory right to a speedy trial is still protected by the constitutional right to a speedy trial.[48] However, we find no merit to Gill's constitutional speedy trial claim.

## CONCLUSION

For the foregoing reasons, we affirm the order of the trial court denying Gill's motion for absolute discharge.

Affirmed.

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[48] See *State v. Williams, supra* note 15.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Mark A. Putnam, appellant, v. Keri G. Scherbring et al., appellees.

902 N.W.2d 140

Filed September 29, 2017. No. S-15-610.

1. **Evidence: Appeal and Error.** Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.
2. **Appeal and Error.** Appellate review of a district court's use of inherent power is for an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Rules of the Supreme Court: Trial: Time.** Under case progression standards adopted by the Nebraska Supreme Court, civil jury cases are to be disposed of within 1 year to 18 months of filing, absent extraordinary circumstances.
5. **Rules of the Supreme Court: Judges: Motions for Continuance.** Trial judges are encouraged to implement firm, consistent procedures for minimizing continuances to meet the case progression standards of the Nebraska Supreme Court.
6. **Rules of the Supreme Court: Attorneys at Law: Courts.** Each member of the bar shall cooperate with the judiciary in meeting the case progression standards of the Nebraska Supreme Court.
7. **Courts.** Nebraska courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.
8. **Trial: Courts.** A trial court has broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial.

Petition for further review from the Court of Appeals, Inbody, Riedmann, and Bishop, Judges, on appeal thereto from

the District Court for Douglas County, Thomas A. Otepka, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Herbert J. Friedman, of Friedman Law Offices, P.C., L.L.O., and Paul Galter, of Butler, Galter & O'Brien, for appellant.

Mark C. Laughlin and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., for appellees.

Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., for amicus curiae Nebraska Defense Counsel Association.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

## I. INTRODUCTION

In order to enforce progression orders in an automobile negligence case, the district court excluded untimely disclosed expert opinions regarding medical bills. Relying upon our decision regarding a discovery sanction,[1] a divided panel of the Nebraska Court of Appeals decided that the district court had abused its discretion.[2] We granted further review and now reverse.

## II. BACKGROUND

The district court excluded untimely disclosed expert opinion testimony which was necessary to lay the foundation for past medical bills presented as damages. The chronology of the case is particularly important, as it drove the district court's decision.

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[1] *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987).

[2] *Putnam v. Scherbring*, No. A-15-610, 2017 WL 163796 (Neb. App. Jan. 17, 2017) (selected for posting to court website).

1. Cause of Action and Pleadings

In December 2008, Mark A. Putnam's motor vehicle collided with the motor vehicle driven by Keri G. Scherbring but owned by her parents, Dale J. Scherbring and Janet K. Scherbring.

In April 2012, approximately 40 months after his cause of action arose, Putnam filed suit against the Scherbrings alleging that he sustained injuries and damages as a result of Keri's negligent driving. He sought general and special damages, including resulting medical expenses incurred since the collision.

The Scherbrings admitted that Keri's negligence proximately caused the accident but denied that it proximately caused injury to Putnam. Thus, Putnam had to prove the extent of his resulting damages and that such damages were proximately caused by the accident.

2. Case Progression

(a) Dismissed for Lack of Prosecution

On August 28, 2013, the district court sent notice to the parties' counsel that unless further action was taken, the case would be dismissed for lack of prosecution pursuant to the Rules of Dist. Ct. of Fourth Jud. Dist. 4-10 (rev. 2010). The parties did not follow the procedure or take any action to avoid dismissal.

On October 1, 2013, the district court dismissed Putnam's action for lack of prosecution. Upon Putnam's motion to reinstate, the district court vacated the order of dismissal and reinstated the case.

(b) Initial Scheduling Order

On October 16, 2013, the court entered the first scheduling order in this case. The order adopted the parties' stipulated proposed order and set forth the following deadlines:

- January 15, 2014—Putnam's deadline to designate expert witnesses;
- March 31, 2014—deadline to complete fact discovery; and
- May 15, 2014—ready for trial date.

Trial was set for July 23, 2014.

(c) New Scheduling Order

Putnam apparently missed the deadline to designate his experts and belatedly supplied incomplete disclosures. When it became clear that the remaining deadlines could not be met after this delay, Putnam moved for a new scheduling order. The parties then stipulated to a new scheduling order. The new scheduling order set September 15, 2014, as the deadline for all expert disclosures and discovery, and to be prepared for trial.

The trial was continued to December 17, 2014. As a result of this continuance, the scheduled trial date was over a year after the district court's standard for disposition of 98 percent of its civil jury cases.[3]

(d) Putnam's First Motion to Continue

On November 21, 2014, 26 days before trial was scheduled to begin and 10 weeks after the deadline to be prepared for trial, Putnam moved to continue the trial. The affidavit accompanying the motion stated that Putnam's counsel had been hospitalized after a scheduled heart surgery and "ha[d] not been able to prepare for trial." It appears that the district court was not aware of counsel's health situation until the motion was filed.

The trial was continued to February 18, 2015. The new trial date would have been 16 months after the standard for disposition of 98 percent of its civil jury cases.[4]

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[3] See Neb. Ct. R. § 6-101(A) (rev. 2013).

[4] *Id.*

### (e) Putnam's Second Motion to Continue

On January 9, 2015, 40 days before the scheduled trial, Putnam filed a second motion to continue. In this motion, his original counsel recited several continuing health concerns that required addition of new lead counsel. However, the new lead counsel had sustained an injury and could not be ready for trial as scheduled.

A hearing was held, and Putnam's counsel offered an affidavit in support of the motion. In it he explained, for the first time, that he had health problems for the duration of 2014 and "was not able to properly prepare for trial." Putnam's new lead counsel also offered an affidavit explaining "it appears that most likely [Putnam] will need to conduct limited additional discovery and the witness and exhibit list may need to be edited relative to medical issues."

The court sustained the motion, without mentioning in its order the oblique request for additional discovery, and continued the trial to June 24, 2015. The new trial date was 11 months after the original trial date and over 20 months after the court's standard for disposition of 98 percent of its civil jury cases.[5]

### (f) Motions to Reopen Discovery

On February 18, 2015, Putnam's new counsel filed a motion to reopen discovery for the purpose of serving requests for admission regarding the fairness, reasonableness, and necessity of Putnam's medical expenses. He also filed a supplemental motion on March 26 to add four additional expert witnesses and for additional limited discovery. These requests were nearly 3 years after Putnam filed suit, 1 year after his extended expert opinion disclosure deadline, and approximately 8 months after the original trial date.

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[5] *Id.*

After a hearing, the district court overruled these motions. In reaching its decision, the court noted that the case was 18 months past the case progression standards target disposition date, that the pending trial date was the fourth date set, that the trial had been continued three times to accommodate Putnam, and that the Scherbrings had been able to timely identify their experts.

(g) Amended Motion in Limine

Because the parties did not stipulate before trial to the fairness and reasonableness of the medical bills, Putnam needed to present expert testimony to lay this foundation.[6] But Putnam failed to timely disclose such an expert opinion.

To remedy this situation, Putnam acquired a supplemental report from one of his doctors who had been previously identified as an expert witness. The report, dated March 30, 2015, apparently disclosed a new expert opinion that Putnam had suffered a traumatic brain injury. It also reported that the medical bills incurred from treatment by the expert witness, as well as the bills from several other treating physicians, were fair, reasonable, and necessary.

Though the report was dated March 30, 2015, it was not disclosed to the Scherbrings until June 2—22 days before trial. And because discovery was closed, the Scherbrings were unable to follow up on the new opinions or depose the expert witness again before trial. Moreover, the disclosure introduced new material that would significantly change the nature of Putnam's claimed injuries.

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[6] See, generally, *Connelly v. City of Omaha*, 284 Neb. 131, 146, 816 N.W.2d 742, 756 (2012) ("[a] person who suffers injury as a result of the negligence of another 'is entitled to recover for the *reasonable* value of medical care and expenses *incurred for the treatment* of injuries'") (emphasis supplied) (citing *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984)); *Oliverius v. Wicks*, 107 Neb. 821, 187 N.W. 73 (1922) (no recovery for medical and hospital expenses where no evidence of reasonable value thereof).

Following this disclosure, the Scherbrings filed an amended motion in limine to exclude evidence that was not disclosed during discovery, including expert reports and opinions concerning medical bills, as well as medical bills not disclosed during discovery. The record does not include the hearing on the amended motion in limine, or a written order disposing of the motion, but it is clear from the court's trial docket entry and the bill of exceptions that the relevant parts of the motion were sustained.

### 3. Trial

The scope of the sustained amended motion in limine was addressed on the first day of trial, outside the presence of the jury. At this time, the court acknowledged the strangeness of the situation by noting parties typically stipulate to fairness and reasonableness of medical bills and then the plaintiff offers evidence to prove necessity. However, the court noted that even in the absence of a stipulation, it "[did]n't see the prejudice in terms of some unfair surprise to the defendant to allow [the previously disclosed expert] to testify about the reasonableness and necessity for [the expert's] bills up to the date of the deposition." Therefore, the court ruled that the expert could testify to the reasonableness and necessity of those bills. It further clarified that any testimony as to the fairness and reasonableness of all *other* medical bills was to be excluded.

As a result, Putnam was not permitted to introduce the vast majority of his medical bills at trial. For strategic purposes, Putnam decided not to offer the previously disclosed expert's bills in light of the exclusion of the others. However, Putnam testified to the extent of his injuries after the accident and the treatment he received. Other previously disclosed medical providers were also allowed to testify to the treatment they provided Putnam for his injuries.

On this evidence, the jury returned a verdict in favor of the Scherbrings. The district court entered a judgment on the jury verdict, and Putnam timely appealed.

### 4. Court of Appeals' Decision

On appeal, the Court of Appeals, in a split decision, relied on our decision in *Norquay v. Union Pacific Railroad*[7] to conclude that "the district court abused its discretion in excluding, as a discovery sanction, nearly all of Putnam's medical bills, as well as testimony from Putnam's expert witness that the bills were reasonable and necessary."[8] In reaching this decision, the majority opinion emphasized that "the district court abused its discretion by not considering the *Norquay* factors at all."[9] Finding error, the court reversed the judgment and remanded the matter to the district court for a new trial. The Court of Appeals rejected Putnam's other assignments of error.

We granted the Scherbrings' petition for further review.

## III. ASSIGNMENT OF ERROR

The Scherbrings assign that the Court of Appeals erred in finding that the district court abused its discretion when it excluded evidence and expert opinion testimony which were disclosed months after the discovery deadline and after the court had previously continued the trial three times. Putnam did not seek further review of the Court of Appeals' rejection of his other assignments of error.

## IV. STANDARD OF REVIEW

[1-3] Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[10] Similarly, appellate review of a district court's use of inherent power is for an abuse of discretion.[11] An abuse of discretion

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[7] *Norquay v. Union Pacific Railroad, supra* note 1.

[8] *Putnam v. Scherbring, supra* note 2, 2017 WL 163796 at *1.

[9] *Id.* at *10.

[10] *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015).

[11] *Tyler v. Heywood*, 258 Neb. 901, 607 N.W.2d 186 (2000).

occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[12]

## V. ANALYSIS

The Scherbrings and amicus curiae assert that the Court of Appeals applied the wrong analysis and erred in finding an abuse of discretion. They argue that the district court was enforcing its previous orders (which had extended discovery deadlines and continued trial dates) when it excluded the evidence in question. And, they maintain that the court did not need to apply the factors set forth in *Norquay v. Union Pacific Railroad*[13] to exercise this power. For the reasons set forth below, we agree.

### 1. Applicability of *Norquay* Factors

Our analysis in *Norquay v. Union Pacific Railroad* was directed to a trial court's authority to preclude testimony as a discovery sanction. In that case, a party failed to comply with a request for discovery and additionally failed to seasonally supplement its answer to an interrogatory. There was no progression order, and the trial court did not find that the testimony in question was untimely disclosed. Therefore, the court's authority to preclude testimony was premised solely upon its power to issue a sanction under rule 37 of the Nebraska Court Rules of Discovery (now codified as Neb. Ct. R. Disc. § 6-337). To ensure a balanced approach to punish those whose conduct warrants a § 6-337 sanction and to deter those who may be inclined or tempted to frustrate the discovery process, we outlined several factors a court should consider before imposing a sanction.

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[12] *State v. Chauncey*, 295 Neb. 453, 890 N.W.2d 453 (2017).

[13] *Norquay v. Union Pacific Railroad, supra* note 1.

In light of our summary of the tortured progression of the case before us, it is clear that *Norquay v. Union Pacific Railroad* does not apply. Indeed, at oral argument, Putnam acknowledged the difficulty of arguing otherwise. Here, the parties stipulated to a proposed progression order with a discovery deadline and the district court adopted and entered the progression order. The court was initially flexible and amended the order and continued trial three times to accommodate Putnam. But, it ultimately elected to enforce its progression order when, shortly before trial, Putnam attempted to disclose new expert opinions and evidence which would undoubtedly cause further delay. This was fundamentally different from imposing a sanction for a party's attempt to abuse the discovery process.

[4-6] Under case progression standards adopted by this Court, civil jury cases are to be disposed of within 1 year to 18 months of filing, absent extraordinary circumstances.[14] Trial judges are encouraged to implement firm, consistent procedures for minimizing continuances to meet these standards.[15] And our standards make it clear that the responsibility for compliance does not rest solely on the judiciary. "Each member of the bar shall cooperate with the judiciary in meeting these standards."[16]

[7] Nebraska courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.[17] It is apparent that the district court relied on this authority and not its authority under § 6-337 to issue a discovery sanction. Therefore, the correct analytical framework did not require the district court to consider the *Norquay* factors.

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[14] See § 6-101(A).

[15] See § 6-101(B)(5).

[16] § 6-101(C).

[17] See *In re Interest of Zachary D. & Alexander D.*, 289 Neb. 763, 857 N.W.2d 323 (2015).

### 2. Abuse of Discretion

Having concluded that the district court was not required to consider the *Norquay* factors, we review its exercise of inherent power for an abuse of discretion.[18] We are not unsympathetic to the serious illness of Putnam's original lead counsel and the unfortunate injury to his successor lead counsel. And it is clear that the district court, through repeated extensions and continuances, gave these matters due consideration. Moreover, the Scherbrings repeatedly agreed to (if not initiated) delays and accommodations to opposing counsel.

[8] We have explained that a court abuses its discretion when its decision is based upon reasons that are *untenable or unreasonable* or if its action is *clearly* against justice or conscience, reason, and evidence.[19] This is a fairly deferential standard. Moreover, a trial court has broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial.[20] Given this standard of review and the breadth of the trial court's discretion, we are unable to find an abuse of that discretion.

There is no evidence that the court based its decision to exclude untimely evidence for any reasons that were untenable or unreasonable. In fact, the record reflects that the court carefully considered its decision and sought to achieve a balanced outcome for both parties. For the same reasons, we cannot find that the court's action was *clearly* against justice or conscience, reason, and evidence. As the trial judge said, "proposed scheduling orders have to mean something." Accordingly, we conclude that the district court did not abuse its discretion in excluding the untimely disclosed expert opinion.

The admissibility of the medical bills was dependent upon the admissibility of the expert opinion that they were fair,

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[18] See *Tyler v. Heywood, supra* note 11.

[19] See *State v. Chauncey, supra* note 12.

[20] See *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

reasonable, and necessary.[21] Therefore, it necessarily follows that the district court did not abuse its discretion in excluding the majority of medical bills for this lack of foundation.

## VI. CONCLUSION

Because the district court exercised its inherent authority to enforce its progression order, we conclude that the analysis set forth in *Norquay v. Union Pacific Railroad* did not apply. We also conclude that it was not an abuse of discretion to exclude evidence disclosed over 1 year after the discovery deadline imposed by the court's progression order. Accordingly, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to affirm the district court's judgment.

Reversed and remanded with directions.

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[21] See cases cited *supra* note 6 and accompanying text.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Paul Gillpatrick and Niccole Wetherell, appellees, v. Diane Sabatka-Rine et al., appellants.

902 N.W.2d 115

Filed September 29, 2017. No. S-16-212.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Statutes: States.** State courts are bound by the U.S. Supreme Court's interpretation of federal statutes.
4. **Attorney Fees: Civil Rights.** Under 42 U.S.C. § 1988 (2012), for a plaintiff to be eligible for attorney fees as a prevailing party, the plaintiff must have obtained a judgment on the merits, a consent decree, or some other judicially enforceable settlement, which materially alters the legal relationship of the parties in a way that benefits the plaintiff. In addition to prevailing on the merits of at least some of its claims, a plaintiff must also show that its court victory advanced the purpose behind Congress' allowance of an attorney fee award: ensuring that financial barriers do not prevent plaintiffs from privately enforcing federal civil rights laws.
5. ____: ____. Under 42 U.S.C. § 1988 (2012), a party is not entitled to seek attorney fees until after it becomes eligible for the fees as a prevailing party.
6. **Judgments: Attorney Fees: Civil Rights.** Under 42 U.S.C. § 1988 (2012), a prevailing party's right to attorney fees cannot be limited by a local rule; for state law actions, a party is required to request attorney fees before the court enters an order or judgment.
7. **Judgments: Final Orders: Attorney Fees: Civil Rights.** In an action brought under 42 U.S.C. § 1983 (2012), a party is not required to

separately move for attorney fees until after the trial court enters a final order or judgment on the merits.

8. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
9. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
10. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
11. **Constitutional Law.** The determination of constitutional requirements presents a question of law.
12. **Statutes.** Statutory interpretation presents a question of law.
13. **Immunity: Public Officers and Employees.** The State's sovereign immunity does not bar actions to restrain state officials or to compel them to perform an act they are legally required to do unless the prospective relief would require them to expend public funds.
14. **Actions: Civil Rights: Public Officers and Employees: Liability.** A state official's liability under 42 U.S.C. § 1983 (2012) turns on the capacity in which the state official was sued, not on the capacity in which the defendant acted.
15. ____: ____: ____: ____. State officials sued in their individual capacities can be personally liable under 42 U.S.C. § 1983 (2012) for an action taken under color of state law that deprived the plaintiff of a federal right.
16. **Constitutional Law: Public Officers and Employees: Immunity.** The 11th Amendment bars a suit against state officials when the State is the real, substantial party in interest.
17. ____: ____: ____. When the State or an arm of the State is named as a defendant, 11th Amendment immunity is not limited to suits seeking damages; absent a waiver, it bars a suit regardless of the relief sought.
18. ____: ____: ____. Under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), a state's 11th Amendment immunity does not bar a suit against state officials when the plaintiff seeks only prospective relief for ongoing violations of federal rights.
19. **Actions: Civil Rights: Public Officers and Employees: Liability.** State officials sued in their official capacities for injunctive relief are persons under 42 U.S.C. § 1983 (2012), because official capacity actions for prospective relief are not treated as actions against the State.

20. **Actions: Public Officers and Employees: Immunity.** A personal capacity suit against a state official does not implicate sovereign immunity, because the plaintiff seeks recovery from the official personally—not from the state's treasury.
21. **Actions: Civil Rights: Public Officers and Employees: Liability.** When a plaintiff in an action brought under 42 U.S.C. § 1983 (2012) seeks injunctive relief to compel state officials to comply with federal law, the claim is available only against a state official sued in his or her official capacity.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Reversed and remanded with instructions.

Douglas J. Peterson, Attorney General, and David A. Lopez for appellants.

Amy Miller, of ACLU of Nebraska Foundation, and Michael D. Gooch for appellees Paul Gillpatrick and Niccole Wetherell.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## NATURE OF CASE

The appellants, Diane Sabatka-Rine, Denise Skrobecki, and Michael L. Kenney, were state officials in the Nebraska Department of Correctional Services (Department). More specifically, Kenney was the Department's director; Sabatka-Rine was the warden at the Nebraska State Penitentiary (NSP); and Skrobecki was the warden at the Nebraska Correctional Center for Women (NCCW). The appellees, Paul Gillpatrick and Niccole Wetherell, are inmates at different prison facilities who sued the state officials in their individual capacities for interfering with the inmates' request to marry. The Department denied the inmates' request under an internal policy that it does not transport an inmate to another facility for a marriage ceremony. Additionally, the inmates were denied a marriage ceremony via videoconferencing because

the Department interprets Neb. Rev. Stat. § 42-109 (Reissue 2016) to require that the inmates both appear physically before an officiant.

The district court ruled that the Department's policy impermissibly burdened the inmates' right to marry and that its interpretation of § 42-109 was constitutionally flawed. The court sustained the inmates' motion for summary judgment, denied the state officials' motion for summary judgment, and enjoined the state officials and their agents from denying the inmates a marriage ceremony via videoconference or enforcing the Department's policy that rested on its flawed interpretation of § 42-109.

Assuming, without deciding, that the court's decision was correct on the merits, we nonetheless reverse. We conclude that the court erred in granting the inmates injunctive relief. We conclude that in a civil rights action filed under 42 U.S.C. § 1983 (2012), state officials can only be sued for injunctive relief in their official capacities. Accordingly, we remand the cause with instructions for the court to vacate its order.

## JURISDICTION

[1,2] The parties dispute whether the state officials have appealed from a final judgment or order; as a result, we address that issue first. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[1] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[2]

The court's order required the state officials to pay all costs but it did not determine attorney fees, which the inmates had requested in their amended complaint. The officials filed their

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[1] *State v. McColery, ante* p. 53, 898 N.W.2d 349 (2017).

[2] *In re Interest of Jassenia H.*, 291 Neb. 107, 864 N.W.2d 242 (2015).

notice of appeal before the court took any action regarding attorney fees.

The inmates moved the Nebraska Court of Appeals to dismiss the appeal because the district court had not entered a final order when the officials filed their appeal. They asserted that their motion for attorney fees and costs was set for a hearing before the defendants filed their appeal. They argued that under our holding in *Kilgore v. Nebraska Dept. of Health & Human Servs.*,[3] the defendants had not appealed from a final order.

In *Kilgore*,[4] we held that the court's failure to address the request for attorney fees in its order left a portion of the judgment unresolved. This failure meant that the order was not final for purposes of appeal.

The plaintiff in *Kilgore* requested attorney fees in her petition. At the close of the evidence, the court announced its ruling from the bench, a portion of which was in the plaintiff's favor, and stated that it would make a determination regarding attorney fees after it calculated her damages. In a subsequent written order, the court reiterated its ruling in favor of the plaintiff and set forth her damages. However, the court's order did not rule on her request for attorney fees. The plaintiff then filed an application for attorney fees, and the defendants filed their appeal.

In addressing the issue of attorney fees, we stated that the plaintiff had properly requested attorney fees in her pleading. We also emphasized that before the court issued its written order, it had announced its ruling from the bench and stated that it would determine attorney fees after calculating damages. We concluded that the court's failure to address the request in its order left a portion of the judgment unresolved, which failure meant that the order was unappealable.

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[3] *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

[4] *Id.*

The state officials in the present matter argued that under *Olson v. Palagi*[5] and *Murray v. Stine*,[6] the district court's order was final, because the inmates failed to move for attorney fees before the court entered its judgment. They did not dispute that the inmates' application for attorney fees was pending before the district court when they filed their notice of appeal. But they argued that under our case law, the court's silence in its order was a denial of a fee award because the inmates had not filed a separate motion for the award. And they argued that holding the order was not final would leave the losing litigants uncertain whether to appeal from a judgment on the merits.

In *Olson*,[7] a father sought a modification of his child support obligation. In the mother's answer, she requested attorney fees and costs, which are authorized under Neb. Rev. Stat. § 42-351 (Reissue 2016). After the court denied a modification, the mother filed a separate application for attorney fees and costs. The father appealed the order denying a modification before the scheduled hearing on the mother's application. While the appeal was pending, the district court dismissed the mother's application for lack of prosecution. But after the Court of Appeals affirmed the judgment on the merits, the district court conducted a hearing on the mother's application, and the father appealed again from the court's fee award.

We vacated the district court's order, concluding that the court lacked jurisdiction to hear the mother's application for a fee award. We reasoned that the district court, by its silence, had implicitly denied the mother's request "under these circumstances."[8] We noted that the order denying the father's complaint to modify did not address the mother's request for attorney fees in her answer. And in a docket entry, the court

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[5] *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

[6] *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015) (per curiam).

[7] *Olson, supra* note 5.

[8] *Id.* at 380, 665 N.W.2d at 585.

had stated that there was "'[n]othing under advisement.'"[9] We stated that attorney fees are generally treated as costs and that parties seeking attorney fees must request them before the court issues a judgment. We concluded that the mother's application for attorney fees had failed to revive the issue because she did not move for a new trial or an amended order and because she did not raise the court's failure to award attorney fees in a cross-appeal. We reasoned that the parties and the Court of Appeals had treated the trial court's order as final, which could have been true only if it had denied attorney fees. We held that after the district court's judgment was final, it lacked jurisdiction to award attorney fees because the mother no longer had any means of challenging its earlier, implicit denial of fees.

In *Murray*,[10] a 2015 case, the defendants had sought a fee award under Neb. Rev. Stat. § 25-824 (Reissue 2016), some defendants in their answer and some in a motion filed before the court entered its summary judgment. The court's summary judgment orders were silent on the issue of attorney fees. We stated that under *Olson*, a judgment's silence "'on the issue of attorney fees *must* be construed as a denial of . . . the request.'"[11] In contrast, we stated if a litigant separately moves for attorney fees before the court enters a judgment on the merits, the order or judgment is not appealable until the court disposes of the request for attorney fees. There, we reasoned that even if the court's summary judgments had "implicitly denied the requests for attorney fees included in the respective answers, it clearly did not dispose of the separate motions for attorney fees."[12] We noted that a hearing on the motions had been scheduled before the court entered its summary judgments and concluded that the court's silence could not be considered

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[9] *Id.*

[10] *Murray, supra* note 6.

[11] *Id.* at 129, 864 N.W.2d 390 (emphasis supplied).

[12] *Id.* at 131, 864 N.W.2d at 391.

a denial of a fee award under those circumstances. We held that the summary judgments were not final, appealable orders because "the absence of a ruling on attorney fees left a portion of the judgment unresolved."[13]

In the instant case, the Court of Appeals denied summary dismissal, noting that neither party had supplemented the record or included a copy of the inmates' application for attorney fees with the appellate filings. But it concluded that the order was final under *Murray* and *Olson*, because the inmates did not separately move for attorney fees before the court issued its summary judgment. We subsequently moved this case to our docket pursuant to Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

Though our holding in *Kilgore* may seem contrary to our holdings in *Olson* and *Murray*, the facts of the cases are distinguishable. In *Kilgore*, the court had announced from the bench that it would determine attorney fees after it calculated the plaintiff's damages, while in *Olson* and *Murray*, the courts were silent as to attorney fees altogether. However, we conclude that the instant case is distinguishable from all three cases because it is a § 1983 action and, as a result, our prior jurisprudence is inapplicable.

Because this is primarily a § 1983 action and the court implicitly granted relief on that claim, the inmates' right to attorney fees is governed by 42 U.S.C. § 1988(b) (2012): "In any action or proceeding to enforce a provision of [specified civil rights statutes, including § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ."

[3,4] State courts are bound by the U.S. Supreme Court's interpretation of federal statutes, including § 1988.[14] Under § 1988, for a plaintiff to be eligible for attorney fees as a

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[13] *Id.*

[14] See *James v. City of Boise, Idaho*, 577 U.S. 306, 136 S. Ct. 685, 193 L. Ed. 2d 694 (2016).

prevailing party, the plaintiff must have obtained a judgment on the merits, a consent decree, or some other judicially enforceable settlement, which materially alters the legal relationship of the parties in a way that benefits the plaintiff.[15] In addition to prevailing on the merits of at least some of its claims,[16] a plaintiff must also show that its court victory advanced the purpose behind Congress' allowance of an attorney fee award: ensuring that financial barriers do not prevent plaintiffs from privately enforcing federal civil rights laws.[17]

"[T]he fees authorized by § 1988 [are] 'an integral part of the remedies necessary to obtain' compliance with § 1983."[18] But the U.S. Supreme Court has held that the time limits for a motion to amend or alter a judgment have no application to a postjudgment request for attorney fees under § 1988, because the motion raises a collateral matter and does not seek a change in the judgment on the merits:

> [A] request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action . . . .
>
> . . . Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one

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[15] See, *Lefemine v. Wideman*, 568 U.S. 1, 133 S. Ct. 9, 184 L. Ed. 2d 313 (2012); *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

[16] See *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011).

[17] See, e.g., *Perdue v. Kenny A.*, 559 U.S. 542, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010); *Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991) (Kennedy, J., dissenting; Rehnquist, C.J., joins); *Missouri v. Jenkins*, 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989); *Hensley, supra* note 15; *Shelby County, Ala. v. Lynch*, 799 F.3d 1173 (D.C. Cir. 2015), *cert. denied* 577 U.S. 1119, 136 S. Ct. 981, 194 L. Ed. 2d 4 (2016).

[18] *Maine v. Thiboutot*, 448 U.S. 1, 11, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980).

> party has "prevailed." . . . [T]he attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial.[19]

In *White v. New Hampshire Dept. of Empl. Sec.*,[20] the Court explained that in the course of civil rights litigation, especially in actions seeking injunctive relief, a court could issue many orders that would cause a plaintiff's counsel to forfeit the right to fees if they did not file a request after every order that could be construed as a "final judgment." The Court further noted that applying a 10-day time limit could deprive counsel of the time needed to negotiate a settlement. It reasoned that these possibilities would only encourage additional litigation. But the Court also stated that federal district courts could adopt local timeliness standards for filing claims for attorney fees and could avoid piecemeal appeals by promptly hearing requests for attorney fees.

[5-7] Under the Court's interpretation of § 1988, a party is not entitled to seek attorney fees until after it becomes eligible for the fees as a prevailing party. And because the Court held that a prevailing party's right to attorney fees is not limited by a time limit for a postjudgment motion, it also cannot be limited by a local rule; for state law actions, a party is required to request attorney fees before the court enters an order or judgment.[21] We are bound by that interpretation. We therefore conclude that in a § 1983 action, a party is not required to separately move for attorney fees until after the trial court

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[19] *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 451-52, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982). See, also, *Bumpers v. Community Bank of N. Virginia*, 364 N.C. 195, 695 S.E.2d 442 (2010); 1 Robert L. Rossi, Attorneys' Fees § 6:18 (3d ed. 2015); 15B Charles Alan Wright et al., Federal Practice and Procedure § 3915.6 (1992 & Supp. 2017); 5 Am. Jur. 2d *Appellate Review* § 391 (2007).

[20] *White, supra* note 19, 455 U.S. at 454.

[21] See *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988).

enters a final order or judgment on the merits. Because our rule for state law actions does not apply, the court's decision on the merits of the pleadings is an appealable order. Having determined that we have jurisdiction, we turn to the facts of this appeal.

## BACKGROUND

Gillpatrick is incarcerated at the NSP in Lincoln, Nebraska, and is serving lengthy sentences for his convictions of second degree murder and use of a weapon to commit a felony.[22] Wetherell is incarcerated at the NCCW in York, Nebraska, and is serving a life sentence for a first degree murder conviction.[23]

### Grievance Procedures

In May 2012, Wetherell submitted a "Marriage Intention Form" and interview request to the religious coordinator at the NCCW. She stated her intention to marry Gillpatrick that July. Gillpatrick submitted a corresponding request at the NSP.

In July 2012, Wetherell filed a grievance, stating that she and Gillpatrick had followed the marriage procedures under the Department's administrative regulation No. 208.01 (AR 208.01), but that the religious coordinator would not record a telephonic wedding as a valid marriage because both parties had to be present. She acknowledged that the Department would not transport her or Gillpatrick to another facility but implicitly wanted the Department to provide a telephonic ceremony. She received an unsigned response denying her request because it was prohibited by the combination of § 42-109 and prison regulations:

> The [Department] will not transport inmates from one institution to another for a marriage ceremony. With the approval of both Wardens, inmates housed at Community

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[22] See *State v. Gillpatrick*, No. A-10-793, 2011 WL 2577279 (Neb. App. June 28, 2011) (selected for posting to court website).

[23] See *State v. Wetherell*, 259 Neb. 341, 609 N.W.2d 672 (2000).

> Corrections Centers may be allowed to enter NCCW in order to be married. You are not permitted to have telephone contact with inmates at other facilities. Per [§] 42-109, the parties shall solemnly declare in the presence of the magistrate or minister and the attending witnesses, that they take each other as husband and wife; and in any case there shall be at least two witnesses, besides the minister or magistrate present at the ceremony.

In August 2012, Wetherell filed another grievance, stating that she and Gillpatrick had requested a telephonic wedding because neither of them would be "classified to community corrections anytime in the future." She asked if they could pay for transportation to the courthouse to comply with § 42-109. The response was the same. In September, she filed an administrative appeal. The Department's director again responded that the Department does not provide transportation for a marriage.

In October 2012, Gillpatrick filed a similar grievance at the NSP, arguing that no laws prohibited their marriage and that he and Wetherell would be "locked up for a very long time" and wished to comfort each other. An officer responded that Nebraska law does not authorize telephonic marriages, the Department's regulations did not authorize an inmate-to-inmate marriage via telephone, and the Department will not transport inmates for a marriage ceremony. In March 2013, Gillpatrick's administrative appeal was denied as untimely. In July, Gillpatrick filed a new grievance. The new grievance, an administrative appeal, and subsequent interview requests were all denied.

## Court Procedures

In February 2014, the inmates filed their first complaint, in which they named the Department, Sabatka-Rine, Skrobecki, and Kenney as defendants. Each state official was sued in his or her official capacity. The inmates alleged that they had no means of exercising their right to marry unless the Department

accommodated them in some manner. They alleged claims under 42 U.S.C. § 1983, the federal Due Process Clause, and the Nebraska Constitution. They alleged that the defendants' policies, customs, and practices had prevented inmates in separate facilities from marrying and that they had a fundamental right to marry, which could not be denied because they were incarcerated. They sought a declaration that the defendants' policies and practices violated the Constitution, as well as a preliminary and permanent injunction requiring the defendants and their agents to "make such accommodations as necessary, consistent with legitimate penological concerns, to facilitate the completion of [their] marriage application."

Despite not having been sued in their individual capacities, the state officials moved, in their individual capacities, to dismiss the inmates' complaint under Neb. Ct. R. Pldg. § 6-1112(b)(1) for lack of subject matter jurisdiction and under § 6-1112(b)(6) for failure to state a claim upon which relief can be granted. At the hearing on the motion to dismiss, the inmates agreed that (1) the Department was entitled to assert sovereign immunity; (2) the court could not order the Department to transport inmates to facilitate a marriage; (3) they had sued the state officials in their official capacities, but served them individually; and (4) they could not ask the court to order the Department "or its employees acting in their official capacity to do something . . . because the [S]tate has not waived its sovereign immunity from the suit in its own courts." But the inmates argued that the court could still determine whether the Department's policies were constitutional and whether they were entitled to prospective relief. They asked for leave to amend. They argued that although they were asking for a declaratory judgment, they were not asking for an advisory opinion, because there were reasonable alternatives to transporting inmates to facilitate a marriage ceremony. The court concluded that the motion to dismiss should be sustained and gave the inmates leave to file an amended complaint.

In the inmates' amended complaint, they omitted the Department as a defendant and sued the same state officials in their individual capacities only. They asserted separate claims against each official and alleged claims under § 1983, Neb. Rev. Stat. § 84-911 (Reissue 2014) of the Administrative Procedure Act (APA), the federal Due Process Clause, and the Nebraska Constitution. For each claim, they alleged that the Department's policies had denied them their fundamental right to marry while they were incarcerated and that the state officials would continue to deny them this right unless enjoined. They alleged that when Kenney denied their administrative appeals, he did so intentionally and without exercising his professional judgment as to whether their request would pose a threat to security, order, or public safety. They made the same allegations against Sabatka-Rine and Skrobecki. The inmates sought a declaration that (1) the Department's policies, customs, and practices, as applied to them, violated the Constitution and (2) the state officials' denial of their requests to marry and their grievances violated their constitutional right to marry. They sought a preliminary and permanent injunction preventing the state officials and their agents from relying on past denials of their marriage requests for any purpose, as well as asking the court for costs and attorney fees.

The state officials filed an answer denying the inmates' allegations, affirmatively alleging that their claims were barred by sovereign immunity and qualified immunity, and that they had failed to state a claim for which relief could be granted. In February 2015, the state officials moved for summary judgment. In May, they moved the court to dismiss the action for lack of subject matter jurisdiction. In July, the inmates objected to the motion to dismiss. In October, they filed a cross-motion for summary judgment.

At a hearing in November 2015, the assistant attorney general representing the state officials stated that he had recently learned the Department had repealed the disputed

language from AR 208.01 but that it would be promulgating similar language in the future. He believed the case could go forward on the validity of the Department's internal policy because the Department would still enforce the policy of the deleted language in AR 208.01, which he argued was not subject to the APA. Because the Department would still enforce its policy, he argued that the court's judgment would not be advisory.

The inmates agreed that they were not asking for an advisory opinion. They had argued the Department could deny a marriage request under AR 208.01 only if a warden finds it would pose a threat to security, order, or public safety. They argued that the Department's position had not changed—i.e., it would not facilitate their marriage—and that their constitutional claim was therefore still alive. They stated that they were not challenging the constitutionality of § 42-109. Instead, they argued that the court could reasonably interpret it to authorize a telephonic ceremony. The state officials conceded that the Department's policy rested on its interpretation of § 42-109. They argued that they should not be required to expend resources to facilitate an unlawful marriage.

## Court's Order

The court rejected the state officials' argument that it lacked authority to interpret § 42-109 because the inmates had asked for declaratory relief under the APA instead of the Uniform Declaratory Judgments Act. The court reasoned that the inmates were asking for relief from the officials' interpretation of the statute to promulgate a rule that impinged on the inmates' right to marry. It described the officials' justification for the rule as not wanting to waste time and resources on an unlawful marriage under a statute that the Department could not ignore. It concluded that the inmates' request for relief from the officials' interpretation of § 42-109 fell within the parameters of § 84-911 of the APA and that the officials had not cited any cogent authority to the contrary. Citing

federal appellate decisions,[24] the court stated, "'Courts are the final authorities on such issues of statutory construction [and] remain free to set aside an agency's construction of a statute if it does not have a reasonable basis in law or if it frustrates congressional policy.'"

In the district court's order, it concluded that the parties' dispute was substantively governed by the U.S. Supreme Court's decision in *Turner v. Safley*.[25] It concluded that the state officials had interpreted the requirement of "presence" in § 42-109 to mean that persons wishing to marry had to declare their intent in the "physical presence" of an officiant. But it concluded that § 42-109 neither directly authorized nor prohibited an officiant from conducting a marriage ceremony by videoconference and that nothing in the statute supported the officials' interpretation. The court noted that (1) the officials had not argued the inmates' marriage posed a threat to security, order, or public safety; (2) they had not stated a penological justification for the challenged policy; (3) they had not argued that arranging the marriage would adversely impact staff or resources; and (4) they had not argued that the technology was unavailable to comply with the inmates' request to marry. It determined that the officials had not satisfied the *Turner* test and that every factor weighed in the inmates' favor.

The court rejected the officials' argument that *Turner* only requires prison officials to have a reasonable justification for preventing inmates from marrying and that § 42-109 provides that justification because it makes telephonic marriages invalid. It stated that like the challenged regulation in *Turner*, the officials' argument showed the Department's marriage restriction was an exaggerated response, which was not related to a valid security or rehabilitative concern. It concluded

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[24] See, *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979); *Metro. Med. Ctr. & Extended Care Fac. v. Harris*, 693 F.2d 775 (8th Cir. 1982).

[25] *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

that the officials had relied solely on their interpretation of § 42-109 to establish a policy that "flies in the face of the [inmates'] constitutional rights."

The court concluded that the Department's policy had impermissibly burdened the inmates' right to marry and that their interpretation of § 42-109, in the context of this case, was constitutionally flawed. It sustained the inmates' motion for summary judgment, denied the officials' motion for summary judgment, and enjoined the officials and their agents from denying the inmates a marriage via videoconference or enforcing the Department's policy that rested on an interpretation of § 42-109 to require the inmates' physical presence before an officiant.

## ASSIGNMENTS OF ERROR

The state officials assign that the court erred as follows:

(1) The court erred to the extent that it ordered any relief under § 84-911 of the APA, because the inmates failed to challenge the validity of a regulation and failed to name the Department as a defendant;

(2) the court erred to the extent that it determined the inmates' rights under any statute, because the inmates failed to file a claim under Neb. Rev. Stat. § 25-21,150 (Reissue 2016) of the Uniform Declaratory Judgments Act;

(3) the court erred to the extent it granted the inmates injunctive relief under the principles of *Ex parte Young*,[26] because their claims were against the officials in their individual capacities;

(4) the court erred to the extent it concluded that the 14th Amendment commands states to affirmatively facilitate videoconference wedding ceremonies between inmates;

(5) the court violated the State's sovereign immunity to the extent its order requires the State to take an affirmative action; and

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[26] *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

(6) the court erred in denying the officials' motion for summary judgment, and in sustaining the inmates' motion for summary judgment and awarding them costs.

## STANDARD OF REVIEW

[8,9] We will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[27] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted and give that party the benefit of all reasonable inferences deducible from the evidence.[28]

[10-12] We independently review questions of law decided by a lower court.[29] The determination of constitutional requirements presents a question of law.[30] Statutory interpretation presents a question of law.[31]

## ANALYSIS

[13] We need not address the state officials' arguments about the inmates' pleading deficiencies for their state law claims here, because those deficiencies are irrelevant to the inmates' § 1983 claim. The district court engaged in statutory interpretation only to reject the officials' argument that the Department's regulation did not violate federal law. As such, its decision primarily rested on the inmates' § 1983 claim. And we reject the officials' argument that sovereign immunity barred any claim for an order to compel them to perform any

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[27] *Thomas v. Board of Trustees*, 296 Neb. 726, 895 N.W.2d 692 (2017).

[28] *Id.*

[29] *In re Estate of Fuchs, ante* p. 667, 900 N.W.2d 896 (2017); *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017).

[30] *Harris, supra* note 29.

[31] *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017).

affirmative act. The State's sovereign immunity does not bar actions to restrain state officials or to compel them to perform an act they are legally required to do unless the prospective relief would require them to expend public funds.[32]

However, we find merit in the officials' third assignment of error that the inmates could not obtain injunctive relief against them, because in their amended complaint, they sued the officials only in their individual capacities.

Section 1983, in relevant part, provides the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

In *Will v. Michigan Dept. of State Police*,[33] the U.S. Supreme Court held that state officials "acting in their official capacities" are not "'persons'" subject to liability for damages under § 1983. The Court interpreted § 1983 to mean that a suit against a state official in his or her official capacity is a suit against the official's office. "Indeed, when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation."[34]

[14,15] In *Hafer v. Melo*,[35] however, the Supreme Court clarified that a state official's liability under § 1983 turns on the capacity in which the official was sued, not on the capacity in which the defendant acted. It held that state officials

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[32] See *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012).

[33] *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

[34] *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).

[35] *Id.*

sued in their individual capacities can be personally liable under § 1983 for an action taken under color of state law that deprived the plaintiff of a federal right.[36] A victory in a personal capacity action is a victory against the individual defendant, rather than against the entity that employs him.[37]

[16-18] These holdings rest on the Supreme Court's 11th Amendment jurisprudence. The 11th Amendment bars a suit against state officials when "'the state is the real, substantial party in interest.'"[38] And when the State or an arm of the State is named as a defendant, 11th Amendment immunity is not limited to suits seeking damages; absent a waiver, it bars a suit regardless of the relief sought.[39] However, under the doctrine of *Ex parte Young*,[40] a state's 11th Amendment immunity does not bar a suit against state officials when the plaintiff seeks only prospective relief for ongoing violations of federal rights.[41]

In *Ex parte Young*, the U.S. Supreme Court held that the 11th Amendment did not bar a suit to enjoin a state attorney general from enforcing a state statute that allegedly violated the 14th Amendment. The Court surveyed its case law and concluded that it showed state officials who are sufficiently connected to the enforcement of an unconstitutional enactment can be enjoined from enforcing it.[42] But the Court also explained that such claims do not affect the state, because if the statute that the official seeks to enforce is unconstitutional

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[36] *Hafer, supra* note 34.

[37] *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

[38] *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).

[39] *Pennhurst State School & Hosp., supra* note 38.

[40] *Ex parte Young, supra* note 26.

[41] *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002).

[42] See *Ex parte Young, supra* note 26.

and therefore void, then the official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[43]

[19] Courts holding that injunctive relief is available in individual capacity suits seem to have read this statement to mean that a suit for prospective relief is against an official individually.[44] But the Supreme Court later explained that the "fiction of [*Ex parte*] *Young*" has been "accepted as necessary" to harmonize states' 11th Amendment immunity with the need to vindicate federal rights and hold state officials responsible to the supremacy of federal law.[45] And the Court has consistently explained that state officials sued *in their official capacities* for injunctive relief are persons under § 1983, because official capacity actions for prospective relief are not treated as actions against the State.[46]

[20] The doctrine in *Ex parte Young* is an *exception* to a state's immunity.[47]

> [T]he exception . . . is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.[48]

In contrast, a personal capacity suit against a state official does not implicate sovereign immunity, because the plaintiff

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[43] *Id.*, 209 U.S. at 160.

[44] See, *Capogrosso v. The Supreme Court of New Jersey*, 588 F.3d 180 (3d Cir. 2009); *MCI Telecommunication Corp. v. Bell Atlantic PA*, 271 F.3d 491 (3d Cir. 2001); *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995).

[45] See *Pennhurst State School & Hosp., supra* note 38, 465 U.S. at 105.

[46] See, *Hafer, supra* note 34; *Will, supra* note 33; *Graham, supra* note 37.

[47] See, *Verizon Md. Inc., supra* note 41; *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).

[48] *Alden, supra* note 47, 527 U.S. at 747.

seeks recovery from the official personally—not from the state's treasury.[49]

Because "individual (or personal) capacity suits" seek recovery from an official personally, instead of seeking "to conform the State's conduct to federal law," the Seventh Circuit has held that the exception in *Ex parte Young* applies only when a state official is sued in his or her official capacity.[50] The court reasoned that because individual capacity suits do not implicate 11th Amendment immunity, creating an exception to that immunity for prospective relief would have been unnecessary if a plaintiff could sue state officials in their individual capacities. It therefore concluded that the twin goals served by the exception in *Ex parte Young* to 11th Amendment immunity—vindicating federal rights and holding state officials responsible to federal law—cannot be achieved by a lawsuit against a state official in his or her individual capacity.[51] Among courts that have reached this issue, the trend and weight of authority is that injunctive relief is not available against officials sued in their individual capacities.[52]

In the instant case, the inmates are not seeking money damages for past injuries, but instead are seeking injunctive relief.

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[49] *Alden, supra* note 47.

[50] *Ameritech Corp. v. McCann*, 297 F.3d 582, 586 (7th Cir. 2002).

[51] *Id.*

[52] See, *Brown v. Montoya*, 662 F.3d 1152 (10th Cir. 2011); *Greenawalt v. Indiana Dept. of Corrections*, 397 F.3d 587 (7th Cir. 2005); *Ameritech Corp., supra* note 50; *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990); *Feit v. Ward*, 886 F.2d 848 (7th Cir. 1989); *Akins v. Bd. of Gov. of State Colleges & Univ.*, 840 F.2d 1371 (7th Cir. 1988), *cert. granted and judgment vacated on other grounds* 488 U.S. 920, 109 S. Ct. 299, 102 L. Ed. 2d 319; *Pascarella v. Swift Transp. Co., Inc.*, 643 F. Supp. 2d 639 (D.N.J. 2009); *Hatfill v. Gonzales*, 519 F. Supp. 2d 13 (D.D.C. 2007); *Meza v. Livingston*, No. 09-50367, 2010 WL 6511727 (5th Cir. Oct. 19, 2010) (unpublished opinion); *Preble v. Milyard*, No. 07-cv-01361-REB-KMT, 2008 WL 4371906 (D. Colo. Sept. 22, 2008) (unpublished decision).

Because the relief is prospective in nature, the State's sovereign immunity would not bar the claim against a state official sued in his or her official capacity.[53]

But we agree with the courts that have held injunctive relief cannot be obtained in a § 1983 action against state officials who were sued in their individual capacities. An injunction against the three named state officials, as individuals, would not vindicate federal rights or hold state officials responsible to federal law, because they have no power as individuals to carry out these responsibilities.

[21] As a result, we hold that when a plaintiff in a § 1983 action seeks injunctive relief to compel state officials to comply with federal law, the claim is available only against a state official sued in his or her official capacity. Because the inmates sued the state officials in their individual capacities only, the court erred in granting them injunctive relief on their § 1983 claim.

## CONCLUSION

We conclude that because federal law controls when a party must move for attorney fees in a § 1983 action, the court's ruling on the merits of the pleadings is an appealable judgment. But we conclude that the court erred in granting the inmates injunctive relief, because in the inmates' amended complaint, they sued the state officials only in their individual capacities. Accordingly, we reverse the court's judgment and remand the cause with instructions for the court to vacate its order.

Reversed and remanded with instructions.

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[53] See, *Anthony K. v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 540, 855 N.W.2d 788 (2014); *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Ian T. Hintz, appellant, v. Farmers Cooperative Association, appellee.

902 N.W.2d 131

Filed September 29, 2017. No. S-16-267.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
3. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.
4. **Workers' Compensation.** The Nebraska Workers' Compensation Act provides that when an employee suffers personal injury caused by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation from his or her employer if the employee was not willfully negligent at the time of receiving such injury.
5. **Workers' Compensation: Proof.** In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.

6. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
7. **Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding on them.
8. **Workers' Compensation: Expert Witnesses.** It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.
9. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.
10. **Evidence: Words and Phrases.** "Competent evidence" is defined as that which is admissible and relevant on the point in issue or, stated another way, admissible and tending to establish a fact in issue.
11. **Expert Witnesses.** When the subject matter is wholly scientific or so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of the physical condition.
12. **Trial: Witnesses.** The question as to the competency of a witness must be initially determined by the trial court.
13. ____: ____. The credibility and weight of the testimony to be given to a witness are for the trier of fact to determine.
14. **Expert Witnesses: Physicians and Surgeons.** For purposes of determining whether a medical expert's testimony is admissible, it is acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners.

Petition for further review from the Court of Appeals, Inbody and Pirtle, Judges, and McCormack, Retired Justice, on appeal thereto from the Workers' Compensation Court, Thomas E. Stine, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Thomas R. Lamb and Richard W. Tast, Jr., of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Jason A. Kidd, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

The issues in this litigation were the nature and extent of a work-related injury sustained by Ian T. Hintz, an employee of Farmers Cooperative Association (Farmers). The Nebraska Workers' Compensation Court found that Hintz' work-related injury was fully resolved within 3 days of the work accident and that Hintz' need for additional medical treatment was the result of a non-work-related injury. Upon appeal, the Nebraska Court of Appeals reversed the decision and remanded the cause with directions for the court to reconsider the claim in light of competent medical opinion of causation and considering the beneficent purpose of the Nebraska Workers' Compensation Act.[1]

We hold that there was sufficient competent evidence in the record to support the Workers' Compensation Court's determination that Hintz' work-related injury was fully resolved prior to his fall on December 4, 2014. Therefore, we reverse the holding of the Court of Appeals.

## BACKGROUND

On Thursday, November 13, 2014, Hintz was employed by Farmers as a tire technician and was repairing a semitrailer tire, when the tire exploded. At the time of the explosion, Hintz was kneeling directly in front of the tire. As a result of the explosion, Hintz was thrown approximately 10 feet and landed on his back. He could not feel his legs, had pain in his groin and hips, and heard "a whistling" in his ears. Within a few minutes, Hintz was able to get up and walk, but he had limited use of his right leg.

Due to the pain Hintz was experiencing, he left work immediately after the explosion and did not return until the

[1] *Hintz v. Farmers Co-op. Assn.*, 24 Neb. App. 561, 891 N.W.2d 716 (2017).

following Monday. However, Hintz did not seek medical care for his injuries in the days immediately following the incident. Hintz indicated that upon returning to work, he was able to work only "a little" at that time.

To the contrary, Farmers offered evidence which suggested that in the days and weeks after Hintz returned to work, he was able to complete all of his job requirements. Such evidence included Hintz' payroll records and the testimony of his coworkers that Hintz resumed his normal job duties without any notable problems.

On December 4, 2014, while walking up a set of stairs at home, Hintz tripped and fell, hitting his hip. Hintz sought medical treatment the next day with Dr. James Gallentine, an orthopedic doctor. Hintz told Gallentine that he was suffering from pain in his right leg which began the night before, when he tripped on his stairs and hit his right hip and knee. Hintz also told Gallentine about the November 13 incident at work; however, he said that since that incident, he had returned to work and "was jumping on and off trucks without any difficulty." Based upon his evaluation, Gallentine prescribed pain medication for Hintz and told him not to return to work for a few days.

The pain in Hintz' right hip and leg did not resolve, and as a result, Gallentine ordered an MRI, which revealed that Hintz was suffering from a "superior labral tear and also some irregularity in the posterior labrum with a possible paralabral cyst forming." Gallentine referred Hintz to Dr. Justin Harris, an orthopedic doctor, "for a possible hip arthroscopy" and directed Hintz to remain off work until further notice. Hintz then completed an application for short-term disability benefits from Farmers. On the application, Hintz indicated that he was temporarily, totally disabled and that his condition was not related to his occupation.

On December 30, 2014, Harris examined Hintz. In his examination notes, Harris indicated that Hintz had been experiencing pain in his right hip since December 4, when he

"tripped going up stairs." Harris' notes did not mention the November 13 work incident.

On February 25, 2015, Harris performed surgery on Hintz to repair the injuries to his hip. The surgical procedures performed included a right hip arthroscopy and labral repair. Harris directed Hintz to remain off work until at least his next scheduled appointment, 6 weeks postsurgery.

After the surgery, Hintz participated in physical therapy. He continued to complain of pain in his right hip and leg and, as a result, was prescribed pain medication. Hintz did not report any notable improvements to his condition.

Farmers terminated Hintz in March 2015 because he had not been to work since December 4, 2014. Within days of being fired, Hintz attended an appointment with Harris, at which time he told Harris that his hip injury was caused by a "tire [blowing] up on him two weeks prior to . . . seeking medical care."

On April 21, 2015, Hintz filed his petition with the Workers' Compensation Court, in which he alleged that he had sustained personal injury in an accident arising out of and in the course of his employment on or about November 13, 2014, and that as a result, he was entitled to disability benefits.

On May 7, 2015, Farmers answered Hintz' petition, denying most of Hintz' assertions. In addition, Farmers affirmatively alleged that any injury or disability Hintz was suffering from was not caused by a "work-related accident."

On May 18, 2015, Harris authored a letter to Hintz' counsel, discussing Hintz' injury to his right hip and the cause of that injury. Harris stated:

> I understand that causation is an issue in this case. When the patient initially presented to me on December 30, 2014, the history that was entered into our notes states that the patient had tripped up his stairs on December 4 . . . . The work injury was not documented at that time.
>
> . . . .

> As I have had the opportunity to discuss the case with [Hintz] since our initial visit, he makes it very clear to me that his symptoms all started with his work injury and that he was basically trying to deal with these on his own in order to keep working until the symptoms became unrelenting in December.
>
> Unfortunately, the documentation that we have in our notes does not necessarily corroborate what [Hintz] is currently stating. It should be noted, however, that the labral tear that we found at surgery was relatively severe and the mechanism of injury seems much more likely to be a high energy work injury as opposed to simply falling up the steps in order to create this type of labral tear.

On that same day, Gallentine also authored a letter to Hintz' counsel, discussing the cause of Hintz' injury. Gallentine stated:

> It is very difficult to specifically assign causation to one event versus the other in the case of . . . Hintz. An individual could certainly have hip related pain and labral pathology from the injury as reported at work on the 13th of November. He also could have similar findings from a fall as he noted having on December 5 [sic], 2014. I do not know that there is any reasonable degree of medical certainty that would specifically assign his injury to one event versus the other. I would certainly be willing to defer to . . . Harris' opinion as he did perform a hip arthroscopy on . . . Hintz and would have had a more direct evaluation of the actual intraarticular pathology noted at that time and whether this could be assigned more directly to one event or the other.

Dr. Dennis Bozarth, an orthopedic doctor, reviewed Hintz' medical records at the request of Farmers' counsel and, on June 8, 2015, authored a letter concerning the cause of Hintz' injury. In the letter, Bozarth states that although he "can't say to a reasonable degree of medical certainty that the work

event on November 13, 2014 had any factor in [Hintz'] complaints of right hip pain," he believes that "more likely than not, [Hintz' hip injury] is related to a trip and fall at home." Bozarth concluded:

> Therefore after review of the available medical records, more likely than not, my opinion is that . . . Hintz did have an accident at work where a tire did blow up, injuring his left lower extremity. This did resolve, and he was working without restrictions. A new incident occurred on November 25 [sic], 2014, causing his right hip to become symptomatic.

After a hearing on Hintz' petition for disability benefits, the compensation court entered an order denying Hintz any workers' compensation benefits. The court noted that both parties agreed that Hintz had a work accident on November 13, 2014. However, the court found that any injury Hintz suffered as a result of the work accident was resolved within 3 days. It further found that Hintz' right hip injury which required surgery was the result of a fall on his stairs at home and not the work accident. Hintz appealed.

The Court of Appeals concluded that the trial court erred in finding that there was no medical evidence to support Hintz' contention that his injury was caused by the tire explosion at Farmers, and as a result, the Court of Appeals reversed the decision of the compensation court and remanded the cause with directions for the court to reconsider the claim in light of competent medical opinion of causation. The appellate court concluded that the finding by the compensation court—wherein the court rejected Harris' opinions because they were "based on an inconsistent history given by [Hintz] and, therefore, [his] opinions lack a credible foundation"—was clearly wrong.

Specifically, the appellate court determined that Harris' opinion was based upon his personal observations of the injury during surgery. The court also noted that Gallentine deferred to Harris' opinion, because Harris performed the surgery.

The Court of Appeals further determined that Bozarth's opinion was not based on any medical conclusions, but merely the review of Hintz' medical records. Thus, the court concluded that Bozarth's opinion did not constitute competent medical testimony.

## ASSIGNMENTS OF ERROR

Hintz did not specifically assign errors in his brief before the Court of Appeals, but argued that the compensation court erred (1) in finding that there was not a causal relationship between his injuries and the November 13, 2014, incident at Farmers and (2) in finding that he was not entitled to any disability benefits.

In its petition for further review, Farmers assigns that the Court of Appeals erred (1) by misapplying the clear error standard of review, in that it did not weigh the evidence in the light most favorable to the successful party and substituted its judgment for that of the trial court; (2) by holding that the opinion of Farmers' expert witness, Bozarth, was "'not competent medical testimony'"; (3) by applying the rule of liberal construction of the Nebraska Workers' Compensation Act to evidence; and (4) in considering Hintz' appeal, given Hintz' failure to specifically assign any errors within his brief.

## STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[2]

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[2] *Nichols v. Fairway Bldg. Prods.*, 294 Neb. 657, 884 N.W.2d 124 (2016).

[2,3] Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.[3] When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.[4]

## ANALYSIS

This case involves two contradictory factual scenarios: (1) whether Hintz fully recovered from the workplace accident and was then reinjured at home or (2) whether Hintz continued to experience pain from the accident and was then reinjured as a result.

[4] The Nebraska Workers' Compensation Act provides that when an employee suffers personal injury caused by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation from his or her employer if the employee was not willfully negligent at the time of receiving such injury.[5]

[5] In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.[6]

[6-8] If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury

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[3] See *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

[4] *Nichols, supra* note 2.

[5] Neb. Rev. Stat. § 48-101 (Reissue 2010).

[6] *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015).

and the claimed disability.[7] The rule in this jurisdiction is that triers of fact are not required to take the opinions of experts as binding on them.[8] It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.[9]

## Sufficiency of Evidence

Here, the compensation court considered the expert medical opinions of three orthopedic doctors and noted that there was conflicting medical evidence presented concerning the nature and extent of Hintz' injuries. Harris opined that Hintz' labral tear which was found at surgery was relatively severe and that the mechanism of injury seemed much more likely to be a "high energy work injury" as opposed to simply falling on the stairs; Bozarth opined that more likely than not, Hintz' work accident injuring his left lower extremity fully resolved prior to his fall at home and that his fall at home caused his right hip to become symptomatic; and Gallentine opined that Hintz could have suffered his hip injury from either the work-related incident or the fall at home.

The compensation court rejected Harris' opinion, finding it not credible that Hintz could have returned to work full duty for several weeks with such a severe tear. Noting that "[t]he value of an expert witness' opinion is no stronger than the facts upon which it is based," the trial court rejected Harris' testimony as lacking a "credible foundation," because it was premised upon an "inconsistent history."

[9] Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workers' Compensation Court.[10]

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[7] *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000).

[8] *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983).

[9] *Owen, supra* note 7.

[10] *Nichols, supra* note 2.

The evidence also showed that Hintz sought no medical treatment after the first injury, but immediately sought medical treatment after the second injury. Further, upon seeking that medical treatment, he repeatedly told his medical care providers that his injury was the result of falling on the stairs. When asked whether the injury was work related, he repeatedly said it was not. Only after Hintz was terminated from his employment did he begin stating that the injury was the result of the tire exploding.

The compensation court found the evidence that Hintz had returned to full-duty work and was experiencing no pain from the accident was more credible than Hintz' version that he continued to experience pain from the accident, which pain first surfaced weeks later.

Although the version of facts found by the compensation court must be accepted on appeal, the Court of Appeals appears to have reweighed the evidence by focusing on the opinion of Harris and rejecting the opinion of Bozarth. Further, the Court of Appeals reweighed the evidence as to the inconsistent statements made by Hintz to both of his doctors, the testimony of his coworkers, and the payroll records.

Since there was competent testimony to support the determination that Hintz' work-related injury fully resolved before the injury he sustained at home, the decision of the compensation court was not clearly erroneous, and therefore, the holding of the Court of Appeals is reversed.

## Effect of Records Review

The Court of Appeals also determined that Bozarth's opinion was not based on any medical conclusions, but merely the review of Hintz' medical records. As a result, the court concluded that his opinion did not constitute competent medical testimony.

In doing so, the appellate court stated that "[t]he sufficiency of an expert's opinion is judged in the context of the expert's entire statement" and that "the value of an expert witness'

opinion is no stronger than the facts upon which it is based"[11]—two contentions with which we agree. However, the Court of Appeals went on to state that "[b]ecause . . . Bozarth's opinion is not based on any medical conclusions, we conclude that his opinion does not constitute competent medical testimony."[12] With this contention we cannot agree.

[10,11] We have defined "competent evidence" to be that which is admissible and relevant on the point in issue or, stated another way, admissible and tending to establish a fact in issue.[13] When the subject matter is wholly scientific or so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of the physical condition.[14]

[12,13] The question as to the competency of a witness must be initially determined by the trial court.[15] However, the credibility and weight of the testimony to be given to a witness are for the trier of fact to determine.[16]

[14] The Court of Appeals misstated our prior jurisprudence when it concluded that Bozarth's expert medical opinion was not competent because he merely reviewed Hintz' medical records. To the contrary, we have routinely held that for purposes of determining whether a medical expert's testimony is admissible, it is acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners.[17]

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[11] *Hintz, supra* note 1, 24 Neb. App. at 570, 891 N.W.2d at 723.

[12] *Id.*

[13] See *Mathes v. City of Omaha*, 254 Neb. 269, 576 N.W.2d 181 (1998).

[14] *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991).

[15] See *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

[16] See *Nichols, supra* note 2.

[17] *Hynes, supra* note 6.

In the instant case, the Workers' Compensation Court appropriately received into evidence the opinions of both Harris and Bozarth as competent medical evidence. The court then correctly considered the conflicting opinions and made a determination as to the weight and credibility to be given each of the opinions. As a result, we disapprove of the Court of Appeals' determination that Bozarth's opinion was not competent.

## CONCLUSION

In the case at bar, the facts were in dispute as to whether Hintz fully recovered from the workplace accident and was then reinjured at home or whether Hintz continued to experience pain from the accident and was then reinjured as a result. The extent of Hintz' injuries was a question of fact to be determined by the trier of fact. The Workers' Compensation Court was not clearly wrong in finding that Hintz did not meet his burden of proving that his subsequent injury was the result of his workplace accident. We reverse the holding of the Court of Appeals and remand the cause to the Court of Appeals with direction to affirm the decision of the Workers' Compensation Court.

Reversed and remanded with direction.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Ethan Bray, appellant.

902 N.W.2d 98

Filed September 29, 2017. No. S-16-874.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Trial: Police Officers and Sheriffs: Search Warrants: Appeal and Error.** An appellate court reviews the trial court's findings of fact for clear error and gives deference to the inferences drawn from those facts by law enforcement officers, the court that issued the search warrants, and the trial court.
3. **Constitutional Law: Search and Seizure: Evidence: Appeal and Error.** When the State seeks to submit evidence as sufficiently attenuated from a previous Fourth Amendment violation, an appellate court will review the trial court's findings of historical facts for clear error but review de novo the court's ultimate attenuation determination based on those facts.
4. **Police Officers and Sheriffs: Search Warrants: Warrantless Searches.** A police officer who has obtained neither an arrest warrant nor a search warrant cannot make a nonconsensual and warrantless entry into a suspect's home in the absence of exigent circumstances.
5. **Search and Seizure: Evidence.** The exclusionary rule prohibits the admission of physical and testimonial evidence gathered illegally.
6. **Constitutional Law: Search and Seizure: Evidence.** One purpose of the exclusionary rule is to compel respect for the constitutional guaranty by removing the incentive to disregard it.
7. **Search and Seizure: Evidence.** The exclusionary rule is applicable only where its deterrence benefits outweigh its substantial social costs.

8. **Evidence: Police Officers and Sheriffs.** Not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal action of the police; the question is whether the evidence has been obtained by exploiting the primary illegality or has instead been obtained by means sufficiently distinguishable so as to be purged of the primary taint.
9. **Constitutional Law: Search and Seizure: Evidence: Police Officers and Sheriffs.** Under the attenuation exception to the exclusionary rule, evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.
10. **Constitutional Law: Search and Seizure: Evidence: Proof.** When the State asserts that evidence obtained in a search following a Fourth Amendment violation is admissible due to the defendant's consent to the search, it must prove two things: (1) The consent was voluntary, and (2) the consent was sufficiently attenuated from the violation to be purged of the primary taint.
11. **Search and Seizure: Evidence: Proof.** There is overlap between the voluntariness and the taint components that the State must prove, but they are not identical.
12. **Constitutional Law: Search and Seizure: Evidence.** A court must consider the evidence's admissibility in the light of the Fourth Amendment's distinct policies and interests, even if a consent to search is voluntary.
13. **Search and Seizure: Duress.** For consent to be voluntarily given, it must be a free and unconstrained choice, not the product of a will overborne, and it cannot be given as the result of duress or coercion, whether express, implied, physical, or psychological.
14. **Constitutional Law: Search and Seizure: Evidence: Time.** In determining whether the causal chain leading to consent is sufficiently attenuated from a Fourth Amendment violation to allow for the admission of the evidence, a court considers three relevant factors: (1) the time elapsed between the constitutional violation and the acquisition of the evidence (temporal proximity), (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct.
15. **Search and Seizure: Police Officers and Sheriffs.** Being thoroughly advised by law enforcement of one's legal rights, including the right to refuse consent, is an intervening circumstance.
16. **Constitutional Law: Search and Seizure: Attorney and Client.** The opportunity for legal consultation is an intervening circumstance and has been considered under various circumstances critically important

in determining that consent was attenuated from a Fourth Amendment violation.

17. **Search and Seizure.** A suspect's knowledge of a prior illegal search can sometimes give rise to a sense that refusing to consent would be futile.
18. **Search and Seizure: Evidence: Police Officers and Sheriffs.** The purpose and flagrancy of the official misconduct is the most important attenuation factor.
19. **Search and Seizure: Evidence.** The underlying purpose of the attenuation exception is to mark the point of diminishing returns of the deterrence principle underlying the exclusionary rule.
20. **Search and Seizure: Evidence: Police Officers and Sheriffs.** If law enforcement did not likely foresee the challenged evidence as a probable product of their illegality, then it could not have been the motivating force behind it and the threat of exclusion could not possibly operate as a deterrent to such conduct.
21. **Search and Seizure: Police Officers and Sheriffs.** Purposeful and flagrant misconduct exists when (1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his or her conduct was likely unconstitutional but engaged in it nevertheless and (2) the misconduct was investigatory in design and purpose and executed in the hope that something might turn up.
22. ____: ____. Courts usually do not deem police misconduct as flagrant unless the illegal conduct was engaged in for the purpose of obtaining consent or the police misconduct was calculated to cause surprise or fear.
23. **Search and Seizure: Search Warrants: Police Officers and Sheriffs.** Officers can take reasonable measures to prevent occupants from becoming disruptive, dangerous, or otherwise frustrating the search; and such routine and preventative measures do not depend on the presence of a threat, actual or perceived, to the officers executing the warrant.

Appeal from the District Court for Nemaha County: Daniel E. Bryan, Jr., Judge. Affirmed.

Keith M. Kollasch, Nemaha County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Wright, J.

## I. NATURE OF CASE

While carrying out a search warrant for the common areas of a house and a roommate's bedroom, law enforcement observed through an open doorway drug paraphernalia in the defendant's bedroom. The district court overruled the defendant's motion to suppress evidence seized from his bedroom following the defendant's consent to a search. Because of the omission of the fact that the informant was in custody when he reported the illegal activities forming the basis for the warrant affidavit, the district court found the search warrant for the common areas was invalid. But the court found that the defendant's consultation over his cell phone with a person identified as his legal counsel, as well as law enforcement's advisement of the defendant's right to refuse consent, resulted in voluntary consent to the search that was sufficiently attenuated from the invalid warrant.

## II. BACKGROUND

Ethan Bray was charged under Neb. Rev. Stat. § 28-416 (Cum. Supp. 2014) with one count of possession of a controlled substance with intent to deliver, a Class III felony; three counts of possession of a controlled substance, which are Class IV felonies; and one count of possession of money used or intended to be used to facilitate a violation of § 28-416(1), a Class IV felony. Before trial, Bray moved to suppress all evidence gathered by law enforcement as a direct or indirect result of the entry and search of his residence on August 23, 2015. The entry of the residence was pursuant to a warrant directed toward one of his roommates, Alexander Gonsalves.

Bray asked for a hearing under *Franks v. Delaware*[1] to determine whether omissions in the warrant were made in reckless disregard for the truth and resulted in the warrant's being issued without probable cause. The district court found

[1] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

the evidence sufficient to warrant a *Franks* hearing, and the following evidence was adduced.

### 1. Warrant

Officer Steven Bures prepared and signed the affidavit for the search warrant. The affidavit described that one of several roommates at Gonsalves' residence, Deven Moore, had reported that drug use and distribution were occurring in the home. Specifically, Moore reported to Bures that Gonsalves was involved in using marijuana. Moore told Bures that he had recently smelled marijuana in the house and had seen bongs and baggies. He had also taken baggies consistent with "dime bags" up to Gonsalves' room 2 to 3 weeks before. Finally, Moore had observed between 6 and 12 people visiting the house in the last 48 hours asking to see Gonsalves and going to Gonsalves' bedroom. Moore explained that he suspected the visitors were there to buy marijuana.

The parties stipulated that at the time Moore gave the information to Bures, he was in custody for driving under the influence. Additionally, Bures admitted on cross-examination that Moore had alcohol in his system when he gave Bures the information about Gonsalves' drug usage. Bures did not describe in the warrant affidavit either that Moore was in custody or that he was under the influence of alcohol when he informed Bures of Gonsalves' illegal activities.

Bures had been a law enforcement officer since 2012. He testified that he did not have any training or experience in preparing an affidavit based on information from an informant who is in custody. He did not know that it was important to specify in the affidavit that the informant was in custody. Bures believed at the time that the warrant was valid.

### 2. Observation of Bray's Room During Execution of Warrant

The warrant was to be served during the daylight hours and was to search for drugs and related items in the common areas of the house and in Gonsalves' bedroom. Officers Kaleb

Bruggeman, Matthew Kadavy, Jeff Timmerman, Harold Silvey, Dan White, and Bures conducted the search in the late afternoon of August 23, 2015.

While conducting the search, the officers observed Bray in his bedroom from the open doorway on the main level. They asked him to come out to the living room. Bray joined Gonsalves and another roommate on the couch in the living room. The roommates were monitored by Bruggeman and White while the remaining officers conducted the search of the common areas and Gonsalves' bedroom upstairs. None of the occupants who waited on the couch were patted down for weapons. They moved around the living room freely, but were asked to stay in that room.

While waiting for the other officers to conduct the search, Bray asked Bruggeman about the search warrant. Bruggeman explained the process of applying for a warrant and allowed Bray to examine it. Bruggeman described their tone as conversational. Bray understood that the warrant was not directed toward him.

Bray used his cell phone freely while in the living room. When it ran out of charge, he asked Bruggeman if he could retrieve a cell phone charger from his room. Bruggeman told Bray that he could, but that Bruggeman would have to accompany Bray into the room for the safety and security of everybody involved in the search warrant. Bray said that was fine. Bruggeman testified at the hearing that he wanted to ensure Bray did not obtain any weapons from the room and that accompanying Bray was standard protocol.

When Bruggeman accompanied Bray into the room, he observed a bong and a grinder with loose-leaf marijuana around it. Bruggeman also detected a strong odor of raw marijuana. Bruggeman did not make any statements at that time to Bray about what he observed, and Bray returned to the living room.

When Timmerman completed his part of the search, he waited in the living room while Bures completed some

paperwork. While doing so, Timmerman observed through the open doorway the bong in Bray's bedroom. He voiced this observation, and Bray responded that it was a vase. Bruggeman interjected that it was a bong.

About 45 minutes after the officers had arrived at the residence and begun their search, Bures joined the others in the living room. Bruggeman and Timmerman advised Bures that there was a bong, a grinder, and some marijuana in Bray's bedroom. From the living room, Bures looked into the room through the open doorway. He was able to observe these three items. He could also smell the odor of marijuana. Bures briefly walked into Bray's room but quickly left, without observing additional items.

### 3. Consent

Bures asked Bray if he could have a conversation with him out on the porch. Bray consented, and Timmerman and Silvey joined them. Bures stood nearest to Bray, while Timmerman and Silvey were farther away at other locations on the porch and did not directly engage in the conversation. Bures told Bray that he had seen drug paraphernalia and marijuana in Bray's bedroom. Bures asked Bray for consent to search his room, explaining that if Bray did not consent, he would apply for a search warrant. Bures described his tone as conversational.

Bray asked if he could call his legal counsel. Bures said he could, and Bray stepped away for a private conversation with someone on his cell phone. After that conversation, which lasted about 5 minutes, Bray said he would consent to the search. Bures retrieved a standard consent form from his vehicle. When Bures returned, he read the form to Bray. Bray also read the form on his own. The form advised Bray of his right to refuse to consent to a search.

Bray filled in his biographical information and then signed the consent form. Bray affirmed on the form that he was giving permission to search his room and vehicle freely and

voluntarily and that he had been informed of his right to refuse to permit the search.

After signing the form, Bray told the officers that he had over an ounce of marijuana in his room and wanted to show them other items in the room too. Bray "led the way" and showed them items in the room that were not particularly incriminating. Eventually, Bures informed Bray that they could conduct the search unassisted. The officers did so, though Bray continued to watch.

The officers seized a small amount of marijuana, the bong, and the grinder that were visible from the doorway. Several additional items that had not been plainly visible were found and seized during the search: two additional containers of marijuana, marijuana resin, two bottles of hashish oil, psilocybin mushrooms, a bottle of hydrocodone prescribed to Gonsalves, three loose amphetamine pills, a 100-gram weight, a digital scale, plastic wrap, small plastic bags, and $1,500 in cash. Bray was taken into custody, at which point he refused to make any statements and requested legal counsel.

### 4. Arguments Below

At the hearing on the motion to suppress, the county attorney acknowledged that the judge had said he would find the search warrant invalid if the informant who provided the information for the warrant affidavit was in custody when he provided the information. Therefore, the county attorney focused on arguing that Bray's consent to the search was sufficiently attenuated from any taint deriving from an illegal search warrant, such that suppression of the evidence was not warranted.

Defense counsel argued that the case law does not support the concept of voluntary consent to a search requested pursuant to observations while on the premises under an invalid warrant. Counsel argued that in such situations, there is never sufficient attenuation from the illegal warrant to purge the primary taint. Counsel further asserted that the Eighth Circuit and several other courts do not expand protective sweeps to

nonarrest situations and that there were no specific, articulable facts in this case indicating there were weapons in the house; thus, the initial entry into Bray's room was improper regardless of the warrant's validity.

### 5. Order on Motion to Suppress

#### (a) Validity of Warrant

The district court agreed with Bray that the warrant was invalid. The court noted that the information in the affidavit in support of the warrant was based entirely on information from an informant. The court cited to *State v. Lammers*,[2] in which we said that the reliability of an informant may be established by showing in the affidavit that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.

The court noted there was no information in the affidavit indicating that Moore had given reliable information to police officers in the past, that Moore had made a statement against his penal interest, or that Bures had conducted an independent investigation establishing Moore's reliability or the reliability of the information Moore gave to Bures. Thus, Bures' affidavit to establish probable cause could rest only on whether Moore was a citizen informant.

The court concluded that Moore could not be considered a citizen informant, however, because he was under arrest and in custody when he gave Bures the information upon which the affidavit was based. The court reasoned that Moore's information was not self-corroborating under *State v. King*,[3] because he could not, while in custody, "voluntarily" come forward with information.

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[2] *State v. Lammers*, 267 Neb. 679, 676 N.W.2d 716 (2004).

[3] *State v. King*, 207 Neb. 270, 298 N.W.2d 168 (1980).

The court concluded that Bures' omission of the fact that Moore was in custody was a reckless disregard for the truth or grossly negligent under *Franks*.[4] Furthermore, the court could not find the affidavit supported probable cause when considering the four corners of the affidavit if it had included the omission. Rather, the district court judge, who had also issued the warrant, stated "categorically" that if he would have known Moore was in custody, he would have required additional information to show reliability of Moore's assertions before finding probable cause for the warrant.

(b) Good Faith

The court rejected any contention that Bures acted in good faith in reliance on the invalid warrant. The court reiterated that Bures was reckless. The court observed that Bures may not have had experience with affidavits for search warrants, but Bures was aware of his lack of experience and should have sought review of his affidavit by officers with more experience or by the county attorney before submitting the information to the court. The court concluded:

> It would be inexplicable to say that the officer acted in reckless disregard for the truth or grossly negligent in not providing important information to the Court to get his search warrant, yet acted in good faith by relying on his prepared affidavit for a search warrant that was issued with material information that he should have known was omitted.

(c) Consent

The court ultimately concluded that Bray's voluntary consent purged the taint of the Fourth Amendment violation. It found the facts most similar to *U.S. v. Greer*,[5] wherein the Eighth Circuit held that the intervening circumstances of consulting with a brother and a written advisement of the right to

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[4] *Franks v. Delaware, supra* note 1.

[5] *U.S. v. Greer*, 607 F.3d 559 (8th Cir. 2010).

refuse consent made the consent to search attenuated from the illegal entry, despite the fact that there was not a long lapse of time between the violation and the consent to search.

The district court noted the facts supporting attenuation of Bray's consent from the illegal entry into the home:

> Bray was not the subject of the original investigation. The search was intended to be only for another resident (Gonsalves). Bray was instructed he needed to stay in the common living area while the search was being conducted in Gonsalves's room and the common areas. The investigation was never intended to focus on Bray. Bray was aware of this because he asked and was given the warrant to read while in the common area before any of the events in regard to Bray unfolded. It was Bray's personal request to leave the common area and go into his room that triggered the events that lead [sic] to his consent to search his room and vehicle. Bray was told if he wanted to go into his room it would be with the company of an officer for security reasons. Bray was ok with that. This was not an attempt by the officer to exploit the search beyond the warrant. There was no pretext. It was Bray that willing [sic] and freely opened this door to expand this investigation. Also, . . . Bures took Bray aside after being told of the observations of the officers and told Bray about what was observed and requested consent to search. He did inform Bray that if he did not consent he would apply for a search warrant. Bray asked to consult with his attorney. Bray was given the opportunity by the officer to call his attorney. Bray made a call and consulted with someone after which he then verbally consented. The officer wanted Bray's consent in writing so he had him fill out and sign exhibit # 3. That form specifically tells Bray he had a right to decline the search and seizure of any property from his residence and vehicle. Bray signed it in any event.

The court balanced these facts of attenuation against the court's conclusion that Bures did not act in an intentionally

deceitful manner.[6] Considering the totality of the circumstances, the court found that the flagrancy of the official misconduct was not so serious that it tainted the consent given by Bray. In other words, the court found that the officer's procurement of Bray's consent to the search was not an exploitation of the illegality of the initial warrant. As such, the court overruled Bray's motion to suppress.

### 6. Conviction and Sentence

Following a stipulated bench trial, the court found Bray guilty of all charges. Bray was sentenced to 4 years of probation. Bray appeals.

## III. ASSIGNMENTS OF ERROR

Bray assigns that the district court erred in overruling his motion to suppress, because it erred in finding that his consent was voluntarily given and that the consent was sufficiently attenuated from the illegal search.

## IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress, based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[7] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[8]

[2] We review the trial court's findings of fact for clear error, and we give deference to the inferences drawn from those facts by law enforcement officers, the court that issued the search warrants, and the trial court.[9]

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[6] See *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

[7] *State v. Rogers, ante* p. 265, 899 N.W.2d 626 (2017).

[8] *Id.*

[9] *U.S. v. Reinholz*, 245 F.3d 765 (8th Cir. 2001).

[3] When the State seeks to submit evidence as sufficiently attenuated from a previous Fourth Amendment violation, we will review the trial court's findings of historical facts for clear error but review de novo the court's ultimate attenuation determination based on those facts.[10]

## V. ANALYSIS

[4] The U.S. Supreme Court has consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant.[11] A police officer who has obtained neither an arrest warrant nor a search warrant cannot make a nonconsensual and warrantless entry into a suspect's home in the absence of exigent circumstances.[12]

The district court found that Bray voluntarily consented to the search of his room and that his consent was sufficiently attenuated from the warrantless entry into the home to render the exclusionary rule inapplicable. We agree with the district court. And because we affirm on the ground that Bray's voluntary consent was attenuated from any illegality deriving from the warrant affidavit, we do not reassess the district court's determination that the omissions from the warrant affidavit were reckless and that the affidavit failed to support probable cause when supplanted with the omitted information.[13]

[5,6] The exclusionary rule prohibits the admission of physical and testimonial evidence gathered illegally.[14] One purpose of the exclusionary rule is to compel respect for the constitutional guaranty by removing the incentive to disregard it.[15]

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[10] *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010).

[11] *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006).

[12] *Id.*

[13] See *U.S. v. Reinholz, supra* note 9.

[14] *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

[15] See *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).

The exclusionary rule includes all evidence derivative of the illegality, referred to as the "fruit of the poisonous tree."[16]

[7,8] However, the exclusionary rule is applicable only where its deterrence benefits outweigh its substantial social costs.[17] Not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal action of the police.[18] The question is whether the evidence has been obtained by exploiting the primary illegality or has instead been obtained by means sufficiently distinguishable so as to be purged of the primary taint.[19]

[9] With this in mind, several exceptions to the exclusionary rule have been recognized.[20] Under the attenuation exception, evidence is admissible when "the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'"[21]

[10-12] When the State asserts that evidence obtained in a search following a Fourth Amendment violation is admissible due to the defendant's consent to the search, it must prove two things: (1) The consent was voluntary, and (2) the consent was sufficiently attenuated from the violation to be purged of the primary taint.[22] There is overlap between the voluntariness and the taint components that the State must prove, but they are

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[16] See, *Utah v. Strieff*, 579 U.S. 232, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016); *Elkins v. United States, supra* note 15.

[17] *Utah v. Strieff, supra* note 16.

[18] See, *Wong Sun v. United States, supra* note 14; *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W.2d 706 (2012).

[19] See *id.*

[20] See *Utah v. Strieff, supra* note 16.

[21] *Id.*, 136 S. Ct. at 2061.

[22] See, *In re Interest of Ashley W., supra* note 18; *State v. Gorup, supra* note 10.

not identical.[23] A court must consider the evidence's admissibility in the light of the Fourth Amendment's distinct policies and interests, even if a consent to search is voluntary.[24]

### 1. Voluntariness

[13] We agree with the district court that Bray's consent to the search of his room was voluntary. For consent to be voluntarily given, it must be a free and unconstrained choice, not the product of a will overborne, and it cannot be given as the result of duress or coercion, whether express, implied, physical, or psychological.[25] The determination of whether consent to search was freely and voluntarily given is based on the totality of the circumstances.[26]

Bray argues that he was under duress because he was detained by six officers for over 45 minutes and because the officers confronted him with the evidence they had observed in his room. But, to the contrary, the evidence shows that Bray was not in a particularly vulnerable subjective state.[27] The evidence indicates Bray was calm throughout the search of the home. While waiting for the search to be completed, Bray was allowed to move around the living room freely and use his cell phone. He was monitored, along with his two roommates, by only two officers. Bray was even allowed, with accompaniment, to enter his room to retrieve a cell phone charger. During the search of the common areas and Gonsalves' room, Bray asked Bruggeman questions about the legal process, which Bruggeman answered in some detail. Bray was allowed to examine the warrant. Bray was well aware that he was not the subject of the search being conducted.

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[23] 4 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 8.2(d) (5th ed. 2012).

[24] See *id.* See, also, *State v. Gorup, supra* note 10.

[25] See *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015).

[26] *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

[27] See *State v. Graham*, 241 Neb. 995, 492 N.W.2d 845 (1992) (account must be taken of possibly vulnerable subjective state of person who consents).

After the search of the house was complete, Bray agreed to speak with Bures out on the porch. Bray and Bures discussed whether Bray might consent to a search of his room. At all times, the tone between Bray and Bures was conversational. Bray was not physically restrained, and the officers who accompanied Bures on the porch kept their distance. When Bray made a call on his cell phone to discuss with his legal counsel the possibility of giving consent, he was given privacy.

Bray was not restrained while Bures left the porch to retrieve the consent form from his vehicle. Bray's thorough review of the consent form, discussions with Bures, and cell phone call to an outside advisor, resulted in clear knowledge of his right to withhold consent.[28]

While Bray was likely motivated to consent by Bures' statement that he would otherwise seek a search warrant, courts have never found statements by officers that they will seek a warrant to be coercive per se.[29] Bures did not deliberately give Bray false information in order to coerce Bray into consenting. And there is no evidence that Bures told Bray that a warrant would certainly be approved.

We can find no support under these facts for Bray's claim that his consent was involuntary because he was under duress. Rather, the State proved that it was the product of free and unconstrained choice.

### 2. Attenuation

[14] We also agree with the district court that Bray's consent was sufficiently attenuated from the Fourth Amendment violation such that the policies behind the exclusionary rule were not served by suppressing the evidence seized during the search. In determining whether the causal chain leading to consent is sufficiently attenuated from a Fourth Amendment violation to allow for the admission of the evidence, we

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[28] See *State v. Konfrst, supra* note 26.

[29] See *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001).

consider three relevant factors: (1) the time elapsed between the constitutional violation and the acquisition of the evidence (temporal proximity), (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct.[30] All relevant facts should be considered to determine whether, under all the circumstances presented, the consent was obtained by exploitation of the prior illegality.[31]

(a) Temporal Proximity

Cases generally decline to find that the temporal proximity factor favors attenuation unless substantial time elapses between an unlawful act and when the evidence is obtained.[32] In this case, there was some adjournment after the illegal search was completed. After the illegal search and before Bray's consent, Bures conversed with other officers, Bray and Bures conversed on the back porch, Bray consulted with an outside advisor on his cell phone, Bures retrieved the consent form from his vehicle, Bures orally reviewed the form with Bray, and Bray carefully read it. Still, these events did not take a substantial period of time. We accordingly find that the temporal proximity factor weighs against attenuation. But temporal proximity is generally considered the least determinative factor involved in the attenuation analysis.[33]

(b) Intervening Circumstances

[15] We find that intervening circumstances weigh in favor of attenuation. Being thoroughly advised by law enforcement of one's legal rights, including the right to refuse

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[30] See, *Brown v. Illinois, supra* note 6; *In re Interest of Ashley W., supra* note 18; *State v. Gorup, supra* note 10.

[31] See, *In re Interest of Ashley W., supra* note 18; *State v. Gorup, supra* note 10.

[32] *Utah v. Strieff, supra* note 16.

[33] See, *People v. Lewis*, 975 P.2d 160 (Colo. 1999); 6 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 11.4(b) (5th ed. 2012).

consent, is an intervening circumstance.[34] As already discussed, Bray was carefully informed by Bures of his legal right to refuse consent.

[16] The opportunity for legal consultation is likewise an intervening circumstance and has been considered under various circumstances critically important in determining that consent was attenuated from a Fourth Amendment violation.[35] Consulting with other advisors, such as family or friends, has similarly weighed in favor of attenuation.[36] Before deciding to consent to the search, Bray consulted over his cell phone with a trusted advisor, in privacy and without any time limit imposed by the officers. And there is no evidence contradicting Bray's statement to the officers that he was consulting at that time with his attorney.

While some courts reason that voluntary consent is not in itself an intervening circumstance,[37] the facts here show that Bray's consent was not merely voluntary in the sense that his will was not overborne. Bray's thorough inquiries, the advisements given, Bray's consultation with counsel, and his calm demeanor suggest that his consent was sufficiently an act of free will to be attenuated from the Fourth Amendment violation.[38]

[17] We find no merit to Bray's argument that his consent was an insufficient act of free will because he considered it

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[34] See, *U.S. v. Perry*, 437 F.3d 782 (8th Cir. 2006); *U.S. v. Mendoza-Salgado*, 964 F.2d 993 (10th Cir. 1992); *U.S. v. Oguns*, 921 F.2d 442 (2d Cir. 1990); *State v. Lane*, 726 N.W.2d 371 (Iowa 2007).

[35] See, *United States v. Wellins*, 654 F.2d 550 (9th Cir. 1981); 29 Am. Jur. 2d *Evidence* § 651 (2008). See, also, e.g., *U.S. v. Fox*, 600 F.3d 1253 (10th Cir. 2010); *State v. Weekes*, 268 N.W.2d 705 (Minn. 1978); *State v. Walsh*, 305 N.W.2d 687 (S.D. 1981).

[36] See, *U.S. v. Barone*, 721 F. Supp. 2d 261 (S.D.N.Y. 2010); *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996); *Wicker v. State*, 667 S.W.2d 137 (Tex. Crim. App. 1984).

[37] See, e.g., *U.S. v. Fox, supra* note 35.

[38] See, *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); *U.S. v. Herrera-Gonzalez*, 474 F.3d 1105 (8th Cir. 2007).

futile to refuse consent once confronted with the items plainly visible in his room. It is true that a suspect's knowledge of a prior illegal search can sometimes give rise to a sense that refusing to consent would be futile.[39] "'[A] person might reasonably think that refusing to consent to a search of his home when he knows that the police have, in fact, already conducted a search of his home, would be a bit like closing the barn door after the horse is out.'"[40]

In this case, though, there were still several horses in the barn. The officers confronted Bray with a bong, a grinder, and a small amount of marijuana that were plainly visible. But Bray knew that the officers had not yet seen many other incriminating items hidden in his room: two additional containers of marijuana, marijuana resin, two bottles of hashish oil, psilocybin mushrooms, a bottle of hydrocodone prescribed to Gonsalves, three loose amphetamine pills, a 100-gram weight, a digital scale, plastic wrap, small plastic bags, and $1,500 in cash.

In light of this, it was not futile to close the barn door. Rather, Bray assessed the situation and determined he might benefit from trying to cooperate instead of running the risk that a search warrant for his room would be obtained. Indeed, his attempts to lead and supervise the search indicate Bray may have hoped to control the amount of incriminating evidence that would be uncovered. The fact that the search did not turn out as Bray may have hoped does not make his choice to consent less an act of free will. We find that intervening circumstances weigh in favor of attenuation.

(c) Purpose and Flagrancy

[18-20] Lastly, we consider the purpose and flagrancy of the misconduct. The purpose and flagrancy of the official misconduct is the most important attenuation factor.[41]

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[39] See *U.S. v. Washington*, 387 F.3d 1060 (9th Cir. 2004).

[40] *U.S. v. Haynes*, 301 F.3d 669, 683 (6th Cir. 2002).

[41] *U.S. v. Simpson*, 439 F.3d 490 (8th Cir. 2006).

This is because the underlying purpose of the attenuation exception is to mark the point of diminishing returns of the deterrence principle underlying the exclusionary rule.[42] If law enforcement did not likely foresee the challenged evidence as a probable product of their illegality, then it could not have been the motivating force behind it and the threat of exclusion could not possibly operate as a deterrent to such conduct.[43]

[21,22] Purposeful and flagrant misconduct exists when (1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his or her conduct was likely unconstitutional but engaged in it nevertheless and (2) the misconduct was investigatory in design and purpose and executed "'in the hope that something might turn up.'"[44] Courts usually do not deem police misconduct as "flagrant" unless the illegal conduct was engaged in for the purpose of obtaining consent or the police misconduct was calculated to cause surprise or fear.[45]

[23] The only misconduct in this case was Bures' reckless omission from the warrant affidavit. And it is undisputed that Bures did not actually know that the warrant affidavit suffered any infirmities. Although Bray complains that Bruggeman acted improperly when he accompanied Bray into his room to retrieve a cell phone charger, we disagree. It was proper for the officers to supervise and limit the movements of the house's occupants while conducting the search. Officers can take reasonable measures to prevent occupants from becoming disruptive, dangerous, or otherwise frustrating

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[42] 6 LaFave, *supra* note 33, § 11.4(a). See, also, e.g., *Brown v. Illinois, supra* note 6; *U.S. v. Simpson, supra* note 41.

[43] See *id.*

[44] *U.S. v. Simpson, supra* note 41, 439 F.3d at 496 (quoting *Brown v. Illinois, supra* note 6).

[45] *Orosco v. State*, 394 S.W.3d 65 (Tex. App. 2012).

the search.[46] Such routine and preventative measures do not depend on the presence of a threat, actual or perceived, to the officers executing the warrant.[47]

There is no evidence that the illegal search of the home and Gonsalves' room had a collateral objective of obtaining consent to search additional bedrooms of the house. In other words, the purpose of the misconduct in omitting information from the warrant affidavit was not investigatory in the hope that "something might turn up." Further, the search was not conducted in a way calculated to cause surprise or fear. To the contrary, the officers were circumspect in carrying out the warrant that they believed to be valid. With limited exceptions, the officers did not cross the threshold into Bray's room until Bray's consent was given. They did not seize the items in plain view in Bray's room or search his room before obtaining his consent. And, as already discussed, such consent followed extensive legal advisements and Bray's outside consultation with counsel.

In sum, the officers' conduct in obtaining Bray's consent was neither a flagrant nor purposeful exploitation of the primary illegality. We accept for purposes of this opinion that Bures should have foreseen that the warrant was illegal, but neither he nor the other officers involved should have foreseen obtaining other occupants' consent to search their bedrooms as a probable product of the invalid search warrant. The invalid search warrant thus could not have been the motivating force

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[46] See, *Bailey v. United States*, 568 U.S. 186, 133 S. Ct. 1031, 185 L. Ed. 2d 19 (2013); *Los Angeles County v. Rettele*, 550 U.S. 609, 127 S. Ct. 1989, 167 L. Ed. 2d 974 (2007); *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005); *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981). See, also, e.g., *U.S. v. Jennings*, 544 F.3d 815 (7th Cir. 2008); *Com. v. Hoffman*, 403 Pa. Super. 530, 589 A.2d 737 (1991).

[47] *Fields v. State*, 203 Md. App. 132, 36 A.3d 1026 (2012). See cases cited *supra* note 46. Compare *Dashiell v. State*, 374 Md. 85, 821 A.2d 372 (2003) (particularized suspicion required to frisk occupants).

behind asking Bray to consent to a search. Accordingly, the threat of exclusion could not possibly operate as a deterrent to the illegal conduct at issue in this case. We find that the last factor of the attenuation analysis weighs heavily in favor of attenuation.

Considering the three factors of temporal proximity, intervening circumstances, and the flagrancy and purpose of the official misconduct, we agree with the district court that the causal chain leading to Bray's consent was sufficiently attenuated from a Fourth Amendment violation to be purged of the primary taint.

## VI. CONCLUSION

The district court correctly determined that Bray's consent was voluntary and that it was not obtained by exploitation of the prior illegality of the search warrant. Therefore, the court properly admitted the evidence obtained during the search of Bray's room. Bray's assignment of error has no merit.

Affirmed.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Stuart Kozal, doing business as Jumping Eagle Inn, et al., appellees and cross-appellees, v. Nebraska Liquor Control Commission, appellant, and Abram Neumann et al., appellees and cross-appellants.

902 N.W.2d 147

Filed September 29, 2017. No. S-17-441.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. Where a lower court lacks subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
4. ____: ____. When an appellate court is without jurisdiction to act, the appeal must be dismissed. However, an appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.
5. **Administrative Law: Liquor Licenses: Judgments: Appeal and Error.** Under the Nebraska Liquor Control Act, an order of the Nebraska Liquor Control Commission granting, denying, suspending, canceling, revoking, or renewing or refusing to suspend, cancel, revoke, or renew a license may be appealed in accordance with the Administrative Procedure Act.
6. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, any person aggrieved by a final decision in a contested case may obtain judicial review in district court.

7. **Administrative Law: Courts: Appeal and Error.** An Administrative Procedure Act proceeding in district court for review of a decision by an administrative agency is not an "appeal" in the strict sense of the term, meaning the power and authority conferred upon a superior court to reexamine and redetermine causes tried in inferior courts, but, rather, is the institution of a suit to obtain judicial branch review of a nonjudicial branch decision.
8. **Administrative Law: Judgments: Appeal and Error.** In an Administrative Procedure Act review proceeding, the district court reviews the agency's decision de novo on the record of the agency and may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings.
9. ____: ____: ____. The Administrative Procedure Act provides that a party initiating review in the district court must do so by filing a petition in the district court of the county where the action is taken within 30 days of service of the agency's final decision and that all parties of record shall be made parties to the proceedings for review.
10. **Administrative Law: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
11. **Administrative Law: Parties: Jurisdiction: Appeal and Error.** The Administrative Procedure Act's requirement that a petitioner make all parties of record in the agency proceeding parties to the proceeding for review is necessary to confer subject matter jurisdiction on the district court.
12. **Administrative Law: Parties: Appeal and Error.** Because the Administrative Procedure Act is a procedural statute that applies to a variety of agencies and types of agency proceedings, determining which parties qualify as "parties of record" requires looking at the nature of the administrative proceeding under review.
13. **Legislature: Statutes: Intent.** The Legislature may limit the scope of a statutory definition to a particular section, act, or chapter.
14. **Administrative Law: Liquor Licenses: Parties: Appeal and Error.** Neb. Rev. Stat. § 53-1,115 (Reissue 2010) defines which parties qualify as "parties of record" in proceedings of the Nebraska Liquor Control Commission and thus must be included in the district court's Administrative Procedure Act review of the commission's proceedings.
15. **Statutes: Intent.** When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context.

16. ____: ____. A court ascertains the meaning of a statute by reading it in pari materia, in light of the broader structure of the relevant act and related statutes.
17. **Statutes: Legislature: Intent.** Where appropriate, a court may consider legislative history in order to better understand a statute's context.
18. **Statutes.** It is a fundamental rule of statutory interpretation that courts should, if possible, avoid any interpretation that renders a portion of the statute as superfluous.
19. **Statutes: Words and Phrases.** A statutory definition of a term found in one statute may be considered when interpreting that same term as used in a different statute.
20. **Administrative Law: Parties: Jurisdiction: Appeal and Error.** The failure to make a party of record in the agency proceedings a party to the proceedings for review as required by the Administrative Procedure Act is a failure to seek review in the mode and manner provided by statute that deprives the district court of jurisdiction.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Vacated and dismissed.

Douglas J. Peterson, Attorney General, James D. Smith, and Milissa D. Johnson-Wiles for appellant.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellees Abram Neumann et al.

Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., for appellees Stuart Kozal, doing business as Jumping Eagle Inn, et al.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Wright, J.

## NATURE OF CASE

The often unremarkable process of renewing a liquor license has involved considerable controversy for the four beer retailers in this case. These retailers are located in the unincorporated border town of Whiteclay, Nebraska, which is just across the state line from the Pine Ridge Indian Reservation in South Dakota, where the sale and consumption of alcohol is

prohibited. The Nebraska Liquor Control Commission (Commission) denied the retailers' license renewal applications. Pursuant to the Administrative Procedure Act (APA),[1] the retailers petitioned for review to the Lancaster County District Court, which vacated the Commission's order. The Commission and some of the citizen objectors appealed.

Our decision today does not address the merits of the parties' respective positions, but rests solely on jurisdictional grounds. To obtain judicial review of an administrative agency's order under the APA, a party must include all "parties of record"[2] from the agency proceeding. Under the Nebraska Liquor Control Act,[3] local residents who formally object to the issuance of a liquor license (citizen objectors) are "parties of record" in the licensure proceeding before the Commission. In this case, when they sought review in the district court, the retailers failed to include the citizen objectors. Thus, the retailers did not comply with the requirements for judicial review under the APA and the district court lacked jurisdiction over the retailers' petition for review. Because the district court lacked jurisdiction, its order is void and we lack jurisdiction over this appeal from the district court. We vacate the district court's order and dismiss this appeal.

## BACKGROUND

The appellees, Stuart Kozal, doing business as Jumping Eagle Inn; Arrowhead Inn, Inc., doing business as Arrowhead Inn; Clay Brehmer and Daniel Brehmer, doing business as State Line Liquor; and Sanford Holdings, L.L.C., doing business as D & S Pioneer Services (collectively the retailers), held Class B liquor licenses, authorizing them to sell packaged beer for consumption off the premises.[4] The Commission required the retailers to submit "long form" applications to renew their

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[1] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2014 & Cum. Supp. 2016).

[2] See § 84-917.

[3] Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2010 & Cum. Supp. 2016).

[4] See § 53-124(6)(a)(ii).

liquor licenses rather than allowing them to use the "short form" automatic renewal process.

After the retailers submitted their applications, the Commission received 13 written objections from citizens of Sheridan County, protesting the renewal of the retailers' licenses. That number was later reduced to 12 when the Commission determined in a prehearing order that one of the objectors was not a resident of Sheridan County. Under § 53-133(1)(b), the filing of "objections in writing by not less than three persons residing within such city, village, or county, protesting the issuance of the license" triggers a requirement that the Commission hold a hearing on the contested applications.

The hearing was held on April 6, 2017. On April 19, the Commission voted to deny the retailers' applications and issued a written order detailing its findings of fact and conclusions of law on April 24.

The following day, the retailers filed a petition, pursuant to § 84-917 of the APA, in the Lancaster County District Court.[5] The retailers argued that the Commission's requirement that they file "long form" applications and the denial of those applications was arbitrary and capricious and contrary to the Nebraska Liquor Control Act and the rulings of this court. But in seeking review in the district court, the retailers failed to make the citizen objectors parties to the petition for review under the APA.

The retailers simultaneously filed a motion to stay the Commission's order during the pendency of the review, which order was set to go into effect on April 30, 2017. A hearing was scheduled and held on April 26 in the Lancaster County District Court. Notice of the hearing was given only to the assistant attorney general representing the Commission. The only attorneys appearing at the hearing were those for the retailers and the Commission. The citizen objectors were not included at any point in the district court proceedings.

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[5] See § 53-1,116.

On April 27, 2017, the district court entered an order. In spite of holding a hearing and receiving arguments on the motion to stay, the district court ruled on the merits of the case. The district court, relying on this court's holdings in *Pump & Pantry, Inc. v. City of Grand Island*[6] and *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*,[7] vacated the Commission's order and remanded the cause to the Commission with instructions to allow the retailers to renew their licenses through the "short form" automatic renewal process.

On April 27, 2017, the same day as the district court's order, the Commission appealed the order. We moved the appeal from the Nebraska Court of Appeals' docket to this court's docket.[8]

On May 26, 2017 (more than 30 days after the Commission's order but less than 30 days after the district court's order), four of the citizen objectors, represented by counsel, filed a notice of appeal from the district court's order. These citizen objectors argued that they were "parties of record" in the Commission's licensure proceeding, but were not made parties to the APA review in the district court. We docketed this appeal together with the Commission's appeal, designating the citizen objectors as appellees and cross-appellants.

## ASSIGNMENTS OF ERROR

The Commission and the citizen objectors claim the district court lacked subject matter jurisdiction to enter its order vacating the Commission's order.

## STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an

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[6] *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989).

[7] *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*, 251 Neb. 61, 554 N.W.2d 778 (1996).

[8] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

appellate court to reach its conclusions independent from a trial court.[9]

## ANALYSIS

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[10] Where a lower court lacks subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.[11] When an appellate court is without jurisdiction to act, the appeal must be dismissed.[12] However, an appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.[13]

[5] Under the Nebraska Liquor Control Act, an order of the Commission "granting, denying, suspending, canceling, revoking, or renewing or refusing to suspend, cancel, revoke, or renew a license" may be appealed "in accordance with the [APA]."[14]

[6-8] Under the APA, "[a]ny person aggrieved by a final decision in a contested case" may obtain judicial review in district court.[15] An APA proceeding in district court for review

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[9] *deNourie & Yost Homes v. Frost*, 295 Neb. 912, 893 N.W.2d 669 (2017).

[10] *In re Interest of Luz P. et al.*, 295 Neb. 814, 891 N.W.2d 651 (2017).

[11] See, *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017); *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016); *Conroy v. Keith Cty. Bd. of Equal.*, 288 Neb. 196, 846 N.W.2d 634 (2014).

[12] *In re Estate of Evertson, supra* note 11; *Conroy v. Keith Cty. Bd. of Equal., supra* note 11.

[13] *Id.*

[14] § 53-1,116.

[15] § 84-917(1).

of a decision by an administrative agency is not an "appeal" in the strict sense of the term, meaning "the power and authority conferred upon a superior court to reexamine and redetermine causes tried in inferior courts," but, rather, is "the institution of a suit to obtain judicial-branch review of a nonjudicial-branch decision."[16] In an APA review proceeding, the district court reviews the agency's decision "de novo on the record of the agency" and "may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings."[17]

[9] The APA provides that a party initiating review in the district court must do so "by filing a petition in the district court of the county where the action is taken" within 30 days of service of the agency's final decision.[18] It further provides that "[a]ll parties of record shall be made parties to the proceedings for review."[19]

[10,11] Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.[20] We have held that the APA's requirement that a petitioner make all "parties of record" in the agency proceeding parties to the proceeding for review is necessary to confer subject matter jurisdiction on the district court.[21]

Here, the citizen objectors were "parties of record" in the Commission's proceeding. The retailers failed to include the

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[16] *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 506, 536 N.W.2d 344, 347 (1995).

[17] § 84-917(5)(a) and (6)(b).

[18] § 84-917(2)(a)(i).

[19] *Id.*

[20] See, *J.S. v. Grand Island Public Schools, ante* p. 347, 899 N.W.2d 893 (2017); *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007).

[21] See *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014).

citizen objectors in the district court's review. The result is that the district court never acquired subject matter jurisdiction to review the Commission's order.

[12] The citizen objectors were "parties of record" in the Commission's hearing on the retailers' license applications. While the APA provides some guidance for when an agency is considered a "part[y] of record" that must be included in APA review of that agency's decision,[22] it provides no guidance for when a nonagency party is a "part[y] of record." Nor does it include an all-encompassing definition of "parties of record," applicable to every type of administrative proceeding. Because the APA is a procedural statute that applies to a variety of agencies and types of agency proceedings, determining which parties qualify as "parties of record" requires looking at the nature of the administrative proceeding under review.[23]

Here, we must look to the Nebraska Liquor Control Act, which governs the Commission and its liquor license application proceedings, in order to determine whether the citizen objectors were "parties of record." And we must look to the proceedings in this case to see whether the citizen objectors acted as parties and were treated as parties by the Commission.

### Nebraska Liquor Control Act Defines Citizen Objectors as Parties of Record

The Nebraska Liquor Control Act, in § 53-1,115, defines which parties qualify as "part[ies] of record" in the

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[22] See § 84-917(2)(a)(i).

[23] See, generally, *Shaffer v. Nebraska Dept. of Health & Human Servs., supra* note 21, 289 Neb. at 750, 857 N.W.2d at 321 (reviewing underlying regulations for "State fair hearing" Medicaid coverage proceeding before Department of Health and Human Services to determine whether Medicaid provider was "party of record" for purposes of APA review); *McDougle v. State ex rel. Bruning*, 289 Neb. 19, 853 N.W.2d 159 (2014).

Commission's proceedings. It provides that "[i]n the case of an administrative proceeding before the [C]ommission on the application for a retail [liquor] license," the "part[ies] of record" include: the applicant, the local government (if it has objected to the issuance of the license or requested a hearing), the Commission itself, and each citizen objector.[24] Thus, the act itself defines citizen objectors as "part[ies] of record" in the Commission's license application proceedings.

[13,14] The retailers argue that the definition of a "party of record" in § 53-1,115(4) "applies only to that particular section."[25] Section 53-1,115(4) begins: "*For purposes of this section*, party of record means . . . ." (Emphasis supplied.) It is true that the Legislature may limit the scope of a statutory definition to a particular section, act, or chapter.[26] But § 53-1,115 defines which parties qualify as "part[ies] of record" in the Commission's proceedings. Thus, it defines which parties are "parties of record" that must be included in the district court's APA review of the Commission's proceedings.

[15-17] When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context.[27] We ascertain the meaning of a statute by reading it in pari materia,[28] in light of the broader

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[24] § 53-1,115(4)(a). See, also, § 53-133(1)(b).

[25] Supplemental brief for appellees Kozal et al. at 3.

[26] See, 2A Norman J. Singer and Shambie Singer, Statutes and Statutory Construction § 47:7 (rev. 7th ed. 2014); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 225-33 (2012).

[27] See, *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016). See, also, generally, *Ross v. Blake*, 578 U.S. 632, 136 S. Ct. 1850, 1856, 195 L. Ed. 2d 117 (2016) ("[s]tatutory interpretation, as we always say, begins with the text"); *State ex rel. Kalal v. Dane County*, 271 Wis. 2d 633, 681 N.W.2d 110 (2004) (statutory language is interpreted in context in which it is used); Scalia & Garner, *supra* note 26.

[28] See Black's Law Dictionary 911 (10th ed. 2014).

structure of the relevant act and related statutes.[29] And where appropriate, we may consider legislative history in order to better understand a statute's context.[30]

Our conclusion that the definition of "party of record" in § 53-1,115(4) controls for purposes of the APA's requirement that "[a]ll parties of record shall be made parties to the proceedings for review"[31] in a review of the Commission's proceedings is confirmed by a closer look at that statute. First, the definition of "party of record" was enacted in the very same bill that amended the Nebraska Liquor Control Act to allow for review of the Commission through the APA.[32] Prior to that bill, § 53-1,116 provided for review through petition in error[33] and expressly stated that the APA did not apply.[34] The fact that the Legislature adopted the definition of "party of record" in § 53-1,115(4)—a key term of art in the APA—in the very same bill in which it adopted APA review of the Commission's orders, leads to the conclusion that the definition in § 53-1,115(4) is the controlling definition of "party of record" for purposes of APA review of the Commission's proceedings.

Second, the legislative history of the bill in which the "party of record" definition was adopted in § 53-1,115 indicates that

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[29] See, e.g., *King v. Burwell*, 576 U.S. 473, 135 S. Ct. 2480, 2492, 192 L. Ed. 2d 483 (2015) (relying on "'the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'"); *County of Webster v. Nebraska Tax Equal. & Rev. Comm.*, 296 Neb. 751, 896 N.W.2d 887 (2017).

[30] See, generally, *Matter of Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) ("[c]larity [of a statute] depends on context, which legislative history may illuminate"); *Doe v. McCoy, ante* p. 321, 899 N.W.2d 899 (2017).

[31] See § 84-917(2)(a)(i).

[32] See 1999 Neb. Laws, L.B. 267.

[33] See Neb. Rev. Stat. §§ 25-1901 to 25-1910 (Reissue 2016).

[34] § 53-1,116(1) (Reissue 1998) ("[t]he [APA] shall not apply to review under this section").

the definition applies to APA review. The bill as introduced would have placed in § 53-1,115 both the definition of "party of record" in the Commission's proceedings and the provision providing for APA review of the Commission's proceedings.[35] The bill was later amended so that the APA review provision would be placed in § 53-1,116.[36] This amendment made a variety of changes, which, in the words of the amendment's introducer, "[we]re technical and intend[ed] for the purpose of clarifying the provisions of [the bill]."[37] Thus, the section originally referred to by the language "[f]or purposes of this section" included the provision regarding APA review of the Commission's orders.[38] And the legislative history indicates that the amendment which moved the APA provision to the following section was not intended to change the fact that the definition of "party of record" would apply to APA review of the Commission's proceedings.[39] Thus, § 53-1,115 defines who are "parties of record" in a hearing before the Commission that the APA requires be made parties to the proceeding for review.

For purposes of defining who are "parties of record" in a hearing before the Commission, § 53-1,115 defines such parties and § 53-1,116 provides that any order of the Commission may be appealed in accordance with the APA.

[18] Third, the definition of "party of record" in § 53-1,115 includes the Commission itself.[40] If the definition of "party of record" for the Commission's proceedings had no application to APA review of those proceedings, it would seem

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[35] Introduced Copy, L.B. 267, General Affairs Committee, 96th Leg., 1st Sess. 42-45 (Jan. 11, 1999).

[36] See Legislative Journal, 96th Leg., 1st Sess. 1446 (Apr. 14, 1999).

[37] Floor Debate, 96th Leg., 1st Sess. 5655-56 (May 3, 1999) (Senator Charlie Janssen).

[38] See Introduced Copy, *supra* note 35.

[39] See Floor Debate, *supra* note 37.

[40] § 53-1,115(4)(a)(iv) and (c)(ii).

odd that the Commission is defined as a party of record. Section 53-1,115(1) through (3) addresses which parties are entitled to receive notice of the Commission's order, have the right to move for rehearing, and may be assessed costs. The Commission has no need to give itself notice of the hearings it conducts, to move itself for rehearing, or to assess costs against itself. To strictly limit the application of the definition of "party of record" in § 53-1,115(4) to that section alone would render the definition of the Commission as a "party of record" as superfluous. It is a fundamental rule of statutory interpretation that courts should, if possible, avoid any interpretation that renders a portion of the statute as superfluous.[41] But the inclusion of the Commission as a "party of record" in § 53-1,115(4) makes much more sense if that definition applies not only to that section, but also to APA review of the Commission's proceedings.

[19] And even if we were to read the phrase "[f]or purposes of this section" in § 53-1,115(4) such that the definition of "party of record" did not expressly apply beyond § 53-1,115, it could still be viewed as persuasive evidence of the meaning of "parties of record" as used in the APA and applied to review of the Commission's proceedings. A statutory definition of a term found in one statute may be considered when interpreting that same term as used in a different statute.[42]

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[41] See, *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017), *modified on denial of rehearing* 296 Neb. 606, 894 N.W.2d 349; Scalia & Garner, *supra* note 26, 174-79 (discussing surplusage canon).

[42] *Matter of J.M.M.*, 890 N.W.2d 750, 754 (Minn. App. 2017) ("[w]e may look to related statutes when interpreting an ambiguous statute. . . . More specifically, we may borrow from other statutes' definitions of terms that are undefined in the statute at issue"); *State v. Turner*, 567 N.E.2d 783, 784 (Ind. 1991) ("a legislative definition of certain words in one statute, although not conclusive, is entitled to consideration in construing the same words in another statute"). See, also, *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556 (Tex. 2014); *Schaefer v. Putnam*, 841 N.W.2d 68 (Iowa 2013) (as corrected Dec. 18, 2013).

Because the APA contains no definition of "parties of record" and because there is no other definition of "party" or "party of record" in the Nebraska Liquor Control Act, the definition in § 53-1,115(4) is, at a minimum, strongly suggestive of the conclusion that citizen objectors are "parties of record" that must be included in a district court's APA review.

And the retailers do not argue that the definition of "party of record" in § 53-1,115 is entirely irrelevant to determining which parties are "parties of record" under the APA. Rather, what they argue is that the controlling definition of "party of record" is the one found in subsection (4)(c) of § 53-1,115, which applies to "administrative proceeding[s] before the [C]ommission to *suspend, cancel, or revoke* a retail . . . license," rather than subsection (4)(a), which applies to "administrative proceeding[s] before the [C]ommission on the *application for* a retail . . . license." (Emphasis supplied.)

The retailers argue that we should look to the definition of "party of record" under § 53-1,115(4)(c), applicable to proceedings to suspend, cancel, or revoke liquor licenses, because "[t]he end result was the same as a cancelation [sic] or revocation."[43] But the end result of this proceeding was not the same as the cancellation or revocation of a liquor license. The retailers' licenses were set to expire, and their applications for the following year were denied. Liquor licenses provide an entitlement for the sale, distribution, or production of alcohol (depending on the type of license) for a period of only 1 year. As § 53-149(1) provides, "[a] license shall be purely a personal privilege, *good for not to exceed one year after issuance* unless sooner revoked as provided in the Nebraska Liquor Control Act, and shall not constitute property . . . ." (Emphasis supplied.) Thus, renewal applications (short form or long form) and applications for new licenses are both applications, because the applicant is seeking an entitlement

[43] Supplemental brief for appellees Kozal et al. at 6.

to which he or she is not currently entitled. This is different from the cancellation or revocation of a license, which takes away an existing entitlement from the license holder. The denial of a license renewal application simply allows the existing 1-year entitlement to expire.

The Commission's proceeding, in name and in substance, was "an administrative proceeding before the commission on the *application* for a retail . . . license."[44] Thus, the relevant definition of "party of record" in § 53-1,115 is that found in subsection (4)(a), not subsection (4)(c). The fact that citizen objectors are defined by the Nebraska Liquor Control Act as "parties of record" in license renewal proceedings establishes that they are "parties of record" that the APA requires to be included in an APA review proceeding.[45]

### Citizen Objectors Acted As and Were Treated As Parties of Record in Commission Hearing

Not only does the Nebraska Liquor Control Act define citizen objectors as "parties of record" in the Commission's liquor license application proceedings, but the citizen objectors in this case acted as and were treated as parties in the Commission's hearing on the retailers' license renewal applications.

In *Shaffer v. Nebraska Dept. of Health & Human Servs.*,[46] we concluded that a Medicaid provider was a "party of record" in a Department of Health and Human Services hearing regarding Medicaid coverage of nursing care that should have been included in the district court's APA review. One of the principal reasons we relied upon to conclude that the provider was a "party of record" was that "it [was] clear from the administrative record that [the provider] participated in the [department's Medicaid] hearing and was treated as a party by the hearing

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[44] See § 53-1,115(4)(a) (emphasis supplied).

[45] See § 84-917.

[46] *Shaffer v. Nebraska Dept. of Health & Human Servs., supra* note 21.

officer."[47] We looked to the fact that the Medicaid provider's "representatives presented evidence, cross-examined witnesses, entered into stipulations, and presented arguments" and that "[a]t the beginning and conclusion of the hearing, the hearing officer referred to [the Medicaid recipient] and [the Medicaid provider] as the 'parties.'"[48]

Here too, the citizen objectors acted as and were treated as parties. The attorney for four of the objectors made a formal appearance as an attorney of record and was listed as an attorney of record in the record of the proceeding. The hearing officer conducted the hearing by allowing the objectors to call witnesses and make their case first, followed by the retailers' case and response to the objectors' arguments and evidence.

The citizen objectors' attorney submitted pretrial witness and exhibit lists, filed and responded to prehearing motions, called witnesses at the hearing, made stipulations, objected to evidence, and examined and cross-examined witnesses. The primary examination of witnesses at the hearing was conducted by the citizen objectors' attorney and the retailers' attorney, with just a few questions asked by the hearing officer and the commissioners. The hearing officer referred to citizen objectors and the retailers as the "parties." And he referred to the unrepresented objectors as "pro se litigant[s]."

And the Commission wrote in its order that in making its decision, it "considered, foremost, the existence of citizen protest, and the adequacy of existing law enforcement." For all practical purposes, the citizen objectors were "parties of record" in the retailers' licensure proceeding.

## Conclusion: Citizen Objectors Are Parties of Record

[20] Because citizen objectors are defined by the Nebraska Liquor Control Act as "part[ies] of record" in the Commission's

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[47] *Id.* at 751, 857 N.W.2d at 322.

[48] *Id.*

liquor license application proceedings and because the citizen objectors acted as and were treated as parties in the Commission's hearing, we conclude that they are "parties of record" for purposes of the APA. The APA requires all "parties of record" in the agency proceeding to be made parties in the district court's review. Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.[49] The failure to make a "part[y] of record" a party to the proceedings for review as required by the APA is a failure to seek review in the mode and manner provided by statute that deprives the district court of jurisdiction. Here, the result of the retailers' failure to include the citizen objectors is that the district court never acquired subject matter jurisdiction to review the Commission's order.

## CONCLUSION

The retailers failed to include all "parties of record" in the Commission proceeding when they sought review in the district court. The district court never acquired subject matter jurisdiction, and as a result, we lack jurisdiction over this appeal. We vacate the judgment of the district court and dismiss this appeal.

Vacated and dismissed.

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[49] *J.S. v. Grand Island Public Schools, supra* note 20; *Nebraska Dept. of Health & Human Servs. v. Weekley, supra* note 20.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Johnnie W. Davis, appellant, v. State of Nebraska et al., appellees.

902 N.W.2d 165

Filed October 6, 2017. No. S-16-355.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
3. **Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Constitutional Law.** The determination of constitutional requirements presents a question of law.
5. **Statutes.** Statutory interpretation presents a question of law.
6. **Tort Claims Act.** Whether a plaintiff's allegations present a claim that is barred by an exception to the State's waiver of tort immunity in a tort claims act presents a question of law.
7. **Tort Claims Act: Immunity: Waiver.** Neb. Rev. Stat. § 81-8,209 (Reissue 2014) bars tort claims against the State, its agencies, and its employees unless the State has waived its immunity for the claim.
8. **Statutes.** Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.
9. **Tort Claims Act: Immunity: Waiver.** Neb. Rev. Stat. § 81-8,215 (Reissue 2014), when read in pari materia with Neb. Rev. Stat. § 81-8,209 (Reissue 2014), operates as a limited waiver of the State's tort immunity, subject to specified exceptions that are set out in Neb. Rev. Stat. § 81-8,219 (2014).

10. **Tort Claims Act: Public Officers and Employees: Immunity: Waiver.** The exceptions to the waiver of the State's tort immunity include claims based on the exercise or performance of a discretionary function by a state officer or employee.
11. ____: ____: ____: ____. Under Neb. Rev. Stat. § 81-8,210 (Reissue 2014), whether a plaintiff has sued a state officer or employee in his or her individual capacity is irrelevant to whether the State Tort Claims Act bars a tort claim against that officer or employee. If an officer or employee was acting within the scope of his or her office or employment and the alleged tortious conduct falls within an exception to the State's waiver of tort immunity, the State Tort Claims Act bars a tort claim against the officer or employee, regardless of the capacity in which he or she was purportedly sued.
12. **Jurisdiction: Appeal and Error.** An appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.
13. ____: ____. When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim.
14. **Actions: Jurisdiction: Immunity.** A trial court lacks subject matter jurisdiction over an action against the State unless the State has consented to suit.
15. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
16. **Courts: Appeal and Error.** The doctrine of stare decisis requires that appellate courts adhere to their previous decisions unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
17. ____: ____. The doctrine of stare decisis is entitled to great weight, but it does not require an appellate court to blindly perpetuate a prior interpretation of the law if it concludes that prior interpretation was clearly incorrect.
18. **Tort Claims Act: Immunity: Waiver: Appeal and Error.** An exception to the State's waiver of immunity under the State Tort Claims Act is an issue that the State may raise for the first time on appeal and that a court may consider sua sponte.
19. **Tort Claims Act: Appeal and Error.** An appellate court has the power to determine whether a plaintiff's allegations, taken as true, show that a tort claim is facially barred by an exception under Neb. Rev. Stat. § 81-8,219 (Reissue 2014).
20. **False Imprisonment: Words and Phrases.** False imprisonment is the unlawful restraint of a person's liberty against his or her will. Any

intentional conduct that results in the placing of a person in a position where he or she cannot exercise his or her will in going where he or she may lawfully go may constitute false imprisonment.

21. **Judgments: Appeal and Error.** An appellate court may affirm a lower court's ruling that reaches the correct result, albeit based on different reasoning.
22. **Constitutional Law: Civil Rights: Immunity.** States or governmental entities that are considered arms of the State for 11th Amendment purposes are not "persons" that can be sued under 42 U.S.C. § 1983 (2012).
23. ____: ____: ____. Whether a state entity is an arm of the State and entitled to share its 11th Amendment immunity is a question of federal law.
24. **Judgments: Civil Rights: Immunity.** Whether a money judgment against a state entity would be enforceable against the State is the critical consideration under 42 U.S.C. § 1983 (2012) for determining whether the entity is an arm of the State and therefore immune from suit by private persons.
25. **Actions: Immunity.** A suit against a state agency is a suit against the State, and both the State and state agencies can assert the State's sovereign immunity against suit.
26. **Constitutional Law: Judgments: Probation and Parole: Civil Rights: Immunity.** Because any judgment against the Board of Parole would be a judgment against the State, it is cloaked with the State's 11th Amendment immunity and cannot be named as a defendant in an action brought under 42 U.S.C. § 1983 (2012).
27. **Actions: Public Officers and Employees: Civil Rights: Liability.** A state official sued in his or her official capacity is not a person who can be sued under an action brought under 42 U.S.C. § 1983 (2012), unless the plaintiff seeks only prospective relief.
28. **Actions: Parties: Public Officers and Employees: Liability: Damages.** When a plaintiff seeks money damages against a state officer or employee in his or her official capacity, the State is the real party in interest, because the officer's liability in that capacity is liability for the state entity that the officer represents.
29. **Actions: Public Officers and Employees: Civil Rights: Immunity: Damages.** Under 42 U.S.C. § 1983 (2012), the State's sovereign immunity does not bar a claim for damages against state officials and employees who are sued in their personal capacities.
30. **Actions: Public Officers and Employees: Civil Rights: Liability.** To establish personal liability in an action brought under 42 U.S.C. § 1983 (2012), it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.

31. ____: ____: ____: ____. Acting under the color of state law does not mean that a state official or employee must have been complying with state law. Under 42 U.S.C. § 1983 (2012), liability exists as long as the action was taken within the scope of the defendant's official authority, even if the official or employee abused his or her authority.
32. **Actions: Public Officers and Employees: Immunity.** State officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.
33. **Constitutional Law: Due Process.** The Due Process Clause of the federal Constitution provides both procedural and substantive protections.
34. **Constitutional Law: Probation and Parole.** Parolees have a valuable liberty interest in their continued parole even though it depends upon their compliance with parole conditions. Parole is therefore protected by the 14th Amendment and requires at least minimal procedural protections before a State can terminate it.
35. **Due Process.** The touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.
36. **Due Process: Public Officers and Employees.** The due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities. But the criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.
37. ____: ____. Only the most egregious official conduct can be said to be arbitrary in the constitutional sense. The substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.
38. **Due Process: Negligence: Liability.** Liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.
39. **Arrests.** Normally, when a State holds an individual in custody, the requisite level of conscience-shocking conduct is deliberate indifference, subject to the caveat that the standard is sensibly employed only when actual deliberation is practical.
40. **Constitutional Law: Arrests.** A plaintiff states a cognizable constitutional violation under the 8th or 14th Amendment when the plaintiff alleges that a state defendant—who had knowledge of the plaintiff's complaint that he or she was being unlawfully detained and the authority to investigate that complaint—was deliberately indifferent to the

plaintiff's liberty interest and the defendant's failure to take action resulted in the plaintiff's continued unlawful detention for more than an insignificant period.

41. **Public Officers and Employees: Immunity: Damages: Words and Phrases.** Public officials performing a quasi-judicial function have absolute immunity from damages for acts they commit within the scope of that function. A quasi-judicial function refers to one that is closely related to the judicial process.
42. **Public Officers and Employees: Immunity: Liability.** In determining whether to grant quasi-judicial immunity, courts examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.
43. **Probation and Parole.** The Board of Parole's mere reliance on evidence presented to it does not change the nature of its function of exercising independent discretion whether to grant, deny, or revoke parole.
44. **Public Officers and Employees: Civil Rights: Immunity: Pleadings.** Most executive officials and employees are limited to asserting qualified immunity as an affirmative defense against a personal capacity claim under 42 U.S.C. § 1983 (2012).
45. **Constitutional Law: Public Officers and Employees: Immunity: Damages: Proof.** Qualified immunity shields state officials from money damages unless a plaintiff alleges facts that would, if proved, show (1) the official violated a federally guaranteed right and (2) the constitutional or statutory right was clearly established at the time of the challenged conduct.
46. **Actions: Immunity.** Because qualified immunity is immunity from suit, a trial court should try to resolve immunity questions at the earliest possible stage in litigation.
47. **Actions: Public Officers and Employees: Immunity: Liability.** Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.
48. **Constitutional Law: Public Officers and Employees.** Whether a federal right is clearly established presents a question of law. A court must consider whether the law is clearly established as it relates to the particular facts of a case. The unlawfulness of a defendant's conduct must be obvious or apparent in the light of preexisting law. That is, the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right.

49. ____: ____. To show a clearly established federal right, the U.S. Supreme Court does not require a case to be directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.
50. ____: ____. A federal right can be established by a robust consensus of cases of persuasive authority.
51. **Public Officers and Employees: Negligence: Immunity.** Showing that a state defendant was negligent is insufficient to defeat a qualified immunity defense. Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law.
52. **Actions: Civil Rights: Liability.** Vicarious liability is unavailable in an action brought under 42 U.S.C. § 1983 (2012).

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Charles E. Wilbrand and Jeanelle R. Lust, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, Bijan Koohmaraie, and David A. Lopez for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

Johnnie W. Davis appeals from the district court's order that dismissed his negligence claim under the State Tort Claims Act (STCA)[1] and his due process and Eighth Amendment claims under 42 U.S.C. § 1983 (2012). Davis alleged that state officials and employees of the Nebraska Board of Parole (Parole Board) and the Department of Correctional Services (Department) were liable for mistakenly concluding that he was subject to a mandatory minimum sentence for a 1995

[1] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014).

habitual criminal conviction. Because of this mistake, the Parole Board revoked his parole and reincarcerated him for nearly 2 months before releasing him on parole again. The district court concluded that all of Davis' claims were barred by sovereign immunity, qualified immunity, or pleading deficiencies, and dismissed his complaint against all defendants.

We overrule Nebraska cases holding that an exception to the State's waiver of immunity for tort claims under the STCA is an affirmative defense that the State must plead and prove. Because the exceptions are jurisdictional in nature, we hold that a court can consider an STCA exception sua sponte and for the first time on appeal. Here, we conclude that the exception for claims of false imprisonment applies, which exception bars Davis' tort claim under the doctrine of sovereign immunity. We further conclude that the court did not err in ruling that the defendants were shielded from Davis' § 1983 action by absolute or qualified immunity.

## II. BACKGROUND

We glean the historical facts leading up to this action from the allegations in Davis' complaint.[2]

### 1. Davis' Arrest, Pleas, and Sentencing

On May 10, 1995, Davis was charged with 11 different crimes and was alleged to be a habitual offender. In January 1996, under a plea agreement, Davis pled no contest to count I, attempted murder in the second degree, and count II, use of a deadly weapon to commit a felony. The State dismissed the remaining charges. In March, the court determined that Davis was a habitual offender and sentenced him to a term of 20 to 30 years' imprisonment for count I and a term of 10 to 20 years' imprisonment for count II, with the terms to be served consecutively.

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[2] See *Jacob v. Nebraska Dept. of Corr. Servs.*, 294 Neb. 735, 884 N.W.2d 687 (2016).

2. Changes to Habitual Criminal Sentencing

Before June 1995, the habitual criminal statute[3] provided the following:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal and shall be punished by imprisonment . . . for a term of not less than ten nor more than sixty years . . . .[4]

In June 1995, the Legislature amended § 29-2221 to provide a mandatory minimum sentence for habitual criminal convictions:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal and shall be punished by imprisonment . . . for a *mandatory minimum* term of ten years and a maximum term of not more than sixty years . . . .[5]

Other mandatory minimums apply if a defendant has been convicted of felonies not at issue here.[6] This amendment became effective in September 1995,[7] after Davis committed his crimes but before he entered his pleas and was sentenced.

Mandatory minimum sentences carry two consequences that a minimum term sentence comprising the same number of years does not. First, a "person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation."[8] Second, the offender cannot become

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[3] See Neb. Rev. Stat. § 29-2221 (Reissue 2016).

[4] See § 29-2221(1) (Cum. Supp. 1994).

[5] See, 1995 Neb. Laws, L.B. 371, § 13 (emphasis supplied), codified at § 29-2221(1) (Reissue 1995).

[6] See *id.*

[7] See *id.*, § 32.

[8] See Neb. Rev. Stat. § 28-105(4) (Reissue 2016).

eligible for parole until the mandatory minimum is served in full; good time credits can be applied to the maximum term of an indeterminate sentence only after the offender serves the mandatory minimum.[9]

### 3. Davis' Release and Reincarceration

In 2012, Davis was paroled. In 2014, the Department obtained warrants to arrest released prisoners for whom it had miscalculated their release dates. Davis' name was not on that list. But an unknown person later added his name to this list, and a warrant was issued for his arrest. In June, Davis was informed by his parole officer that he needed to turn himself in because his parole eligibility date had been miscalculated. Davis had not violated his parole, and he was employed. Before turning himself in to the Department on June 25, he informed the Department and his parole officer that the mandatory minimum provision did not apply to him and that his parole eligibility date was correct. Neither the Department nor the Parole Board investigated his claim.

At a parole hearing on July 29, 2014, the Parole Board revoked his parole despite his continued claim that he was not subject to the mandatory minimum amendment. On August 22, Davis was released again and given a certificate of parole. Six months after filing a "State Torts Claim" with the State's risk management division, Davis filed this action.

### 4. Davis' Claims

Davis named 16 defendants in his complaint: the State; the Department; the Attorney General's office; the Parole Board; the former governor; the former Attorney General; the Department's former director, former records administrator, former general counsel, and two of its former attorneys; the Parole Board's former and current chairpersons, its former vice

[9] See, Neb. Rev. Stat. § 83-1,110 (Reissue 2014); *Caton v. State*, 291 Neb. 939, 869 N.W.2d 911 (2015); *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002).

chairperson, and a current and former member. He sued all of the state officers and employees in their official and individual capacities.

For Davis' negligence claim under the STCA, he alleged that all the state defendants owed him a duty not to violate his civil rights and not to reincarcerate him or cause his reincarceration unless he had violated his parole. Davis alleged, condensed, that the defendants breached these duties when, despite his protests, they (1) failed to research the correct law and applied the wrong law to calculate his parole eligibility date, (2) determined that he had not served enough time, (3) added his name to a list of persons who should be arrested, and (4) reincarcerated him for 59 days when he should have been on parole.

Davis alleged that in 1997, the Attorney General issued an opinion at the request of the Department's director at that time.[10] The Attorney General stated that generally, the good time provisions in effect when an offender committed the offense are the ones that apply to calculating the offender's sentence,[11] unless a later amendment increases the amount of credit that an offender can receive.[12] Davis alleged a lack of institutional oversight, implementing policies, and training; and he alleged deliberate indifference to his rights. He alleged that he lost his job as a valet, his engraving business, and the house he was renting and that his arrest had strained his relationship with his girlfriend and his family. He alleged that this stress led to two occasions when he attempted suicide while incarcerated.

For his § 1983 due process claim, Davis alleged that the defendants' "acts, omissions, policies and practices [were] a substantial departure from accepted professional judgment, . . .

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[10] Att'y Gen. Op. No. 97005 (Jan. 14, 1997).

[11] See *id.*, citing *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[12] *Id.*, citing *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995).

constitute[d] punishment, [and] reflect[ed] deliberate indifference to the known and obvious consequences to [him].” For his § 1983 Eighth Amendment claim, he alleged that the defendants’ “acts, omissions, policies and practices . . . constitute[d] cruel and unusual punishment.” He alleged the defendants’ conduct had caused him to suffer unspecified economic and noneconomic damages.

5. Hearing on Defendants’ Motion to Dismiss

The defendants moved to dismiss Davis’ negligence claim and § 1983 claims under Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6). Their motion did not set out any specific grounds for a dismissal. At the hearing, the defendants argued that because Nebraska courts have held that the Parole Board’s functions are quasi-judicial and inherently discretionary, Davis’ claims against its members were not cognizable. They also argued that because the Parole Board had exclusive jurisdiction over Davis’ parole revocation, the court should dismiss Davis’ claims against the other defendants. Alternatively, they argued that Davis’ § 1983 claims were deficient, because he had not alleged that the defendants were personally involved in determining that his parole should be revoked or in procuring his reincarceration. Regarding Davis’ deliberate indifference allegations, the State argued that he would have to allege that the defendants knew he should not be reincarcerated and that they did so despite that knowledge. Regarding Davis’ negligence claim, the State argued that the defendants who were not Board members were immune from suit under the doctrine of sovereign immunity, because they were performing a discretionary function.

Davis responded that the Department is the main state agency with the duty to determine parole eligibility dates and release dates from mandatory minimum sentences. He argued that these duties were ministerial and not discretionary and that the Parole Board was not entitled to quasi-judicial immunity. He argued that his release on parole 2 months after he was reincarcerated showed that the only reason for his parole

revocation was an incorrect calculation of his parole eligibility date.

Davis also argued that the Department had continuing duties—before, during, and after his parole revocation—to review the record, apply the law correctly, and inform the Parole Board of its determinations. He argued that these duties showed other state actors besides the Parole Board were involved in his parole revocation and reincarceration. As a result, he argued that he could not yet plead with particularity and that the court could not yet determine whether any of the defendants were entitled to qualified immunity, because he had not had an opportunity to discover what each state actor had done.

### 6. Court's Order

The court granted the defendants' motion to dismiss. In its order, the court concluded that the Parole Board and its members were immune from Davis' claims, because they perform a quasi-judicial function that is inherently discretionary. It stated that Davis' claims against the Parole Board's members arose solely out of their official function and that Nebraska law did not permit civil damages for decisions involving discretion. It dismissed Davis' claims against the Parole Board and its members with prejudice.

The court dismissed Davis' claims against the defendants who were not members of the Parole Board, because all of his claims arose from the revocation of his parole. The court determined that they were not involved in the revocation process and had no authority over the decision and that Davis had not alleged any facts connecting them to the revocation. It concluded that despite Davis' allegations about the Department's duties, the Parole Board had exclusive jurisdiction over his parole revocation, which did not involve the Attorney General's office or any other defendant who was not a Parole Board member.

Regarding Davis' negligence claim, the court reasoned that under the STCA, the State can be liable only to the same extent as a private person would be under similar circumstances and a private person cannot revoke parole. Additionally, the court concluded that Davis' "negligence action triggers the discretionary function exception [to the State's waiver of immunity] because his claims are based upon State employees' executing Nebraska statutes . . . and performing discretionary functions."

Regarding Davis' § 1983 claims, the court concluded that his claims against the State, state agencies, and state defendants in their official capacities were barred by sovereign immunity. It additionally found that the claims were not cognizable, because Davis had failed to "plead with any specificity that any named Defendant actually participated in any alleged constitutional violation." Alternatively, the court ruled that the defendants were entitled to qualified immunity from Davis' due process and Eighth Amendment claims. It concluded that the defendants' mistaken belief that Davis' parole eligibility date was correct did not deprive them of qualified immunity, because there is "no 'clearly established constitutional right' making State officials individually liable for erroneous parole revocations under the Eighth Amendment."

## III. ASSIGNMENTS OF ERROR

Davis assigns, consolidated and restated, that the court erred as follows:

(1) in dismissing all of his claims with prejudice;

(2) in determining that the Parole Board and its members are immune from his claims;

(3) in determining that the defendants who are not Parole Board members cannot be held liable for his reincarceration;

(4) in failing to weigh the role that the defendants who are not Parole Board members played in his reincarceration;

(5) in determining that the State has not waived its sovereign immunity for his negligence claim;

(6) in determining that his negligence claim is barred by the discretionary function exception to the State's waiver of sovereign immunity;

(7) in determining that he failed to plead his § 1983 claims with sufficient specificity;

(8) in determining that the defendants were entitled to qualified immunity; and

(9) in not allowing him to amend his complaint.

## VI. STANDARD OF REVIEW

[1,2] We review a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[13] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face.[14] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[15]

[3-6] We independently review questions of law decided by a lower court.[16] The determination of constitutional requirements presents a question of law.[17] Statutory interpretation presents a question of law.[18] Whether a plaintiff's allegations present a claim that is barred by an exception to the State's waiver of tort immunity in a tort claims act presents a question of law.[19]

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[13] *Jacob, supra* note 2.

[14] *First Neb. Ed. Credit Union v. U.S. Bancorp*, 293 Neb. 308, 877 N.W.2d 578 (2016).

[15] *Id.*

[16] *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017).

[17] *Id.*

[18] *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017).

[19] See *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014).

## V. ANALYSIS

### 1. State Officers and Employees Acting Within Scope of Their Offices or Employment Can Be Sued for Tortious Conduct Only in Their Official Capacities

Davis contends that he sued the defendants in their individual capacities and that some of the state employees acted outside of the scope of their duties. The State responds that Davis' negligence claim is not cognizable against the state defendants in their individual capacities. We agree.

[7] Section 81-8,209 of the STCA bars tort claims against the State, its agencies, and its employees unless the State has waived its immunity for the claim:

> The State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the state, any state agency, or any employee of the state on any tort claim except to the extent, and only to the extent, provided by the [STCA].

Section 81-8,215 is the State's general waiver of tort immunity under the STCA.[20] In relevant part, it provides that the State "shall be liable in the same manner and to the same extent as a private individual under like circumstances."

[8-10] Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.[21] Section 81-8,215, when read in pari materia with § 81-8,209, operates as a limited waiver of the State's tort immunity, subject to specified exceptions that are set out in § 81-8,219.[22] The exceptions to the waiver of the State's tort immunity include claims based on the exercise

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[20] See *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997).

[21] *D.I. v. Gibson*, 295 Neb. 903, 890 N.W.2d 506 (2017).

[22] See *Bronsen v. Dawes Cty.*, 272 Neb. 320, 722 N.W.2d 17 (2006). See, also, § 81-8,215; *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002); *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998).

or performance of a discretionary function by a state officer or employee.[23]

[11] Under § 81-8,210, whether a plaintiff has sued a state officer or employee in his or her individual capacity is irrelevant to whether the STCA bars a tort claim against that officer or employee. That is because § 81-8,210(4) defines a tort claim to mean a claim for money damages caused by the wrongful or negligent conduct of an officer or employee who was acting "within the scope of his or her office or employment, under circumstances in which the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death." And § 81-8,209 authorizes tort liability for a state officer or employee only to the extent the STCA permits. So, under the STCA's definition of a tort claim, plaintiffs are limited to suing state officers and employees in their official capacities.[24] We have held that only when the officer or employee was *not* acting within the scope of his or her office or employment can a plaintiff pursue a tort claim against the officer or employee individually.[25] This means that if an officer or employee was acting within the scope of his or her office or employment and the alleged tortious conduct falls within an exception to the State's waiver of tort immunity, the STCA bars a tort claim against the officer or employee, regardless of the capacity in which he or she was purportedly sued.

Here, the state defendants could not have committed the tortious acts set out in Davis' complaint as private individuals. To the extent that Davis implies that the defendants may have acted in bad faith, that argument is relevant to

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[23] See § 81-8,219(1).

[24] See *Kruger v. Nebraska*, 820 F.3d 295 (8th Cir. 2016). Accord, *D.M. v. State*, 23 Neb. App. 17, 867 N.W.2d 622 (2015); *Bojanski v. Foley*, 18 Neb. App. 929, 798 N.W.2d 134 (2011).

[25] See, e.g., *Lamb v. Fraternal Order of Police Lodge No. 36*, 293 Neb. 138, 876 N.W.2d 388 (2016); *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997); *D.M., supra* note 24.

whether the defendants are entitled to quasi-judicial immunity,[26] not to whether they were acting within the scope of their office or employment. So even if they were negligent or abused their authority, Davis' argument that they might have acted outside of the scope of their official duties is without merit.[27] Accordingly, whether they were sued in their individual capacities is irrelevant to the court's dismissal of Davis' negligence claim.

### 2. State Can Raise STCA Exception for First Time on Appeal

At oral arguments, the State argued that Davis' claim arose from a false imprisonment and was therefore barred by the intentional tort exception to the State's waiver of immunity. Under § 81-8,219(4), the State's waiver of immunity does not apply to "[a]ny claim arising out of . . . false imprisonment . . . ." But the State conceded that it did not raise this issue to the district court.

In *Maresh v. State*,[28] the State chose to raise the immunity issue as an affirmative defense. As a result, we held that the burden to prove the defense rested on the defendant.[29] We expanded this reasoning in *Sherrod v. State*,[30] in which we held that exceptions to the general waiver of the STCA are matters of defense that the State must plead and prove. And we have repeated this holding in other cases.[31]

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[26] See *Noffsinger v. Nebraska State Bar Assn.*, 261 Neb. 184, 622 N.W.2d 620 (2001).

[27] See *Lamb, supra* note 25.

[28] *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992) (superseded in part by statute as stated in *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010)).

[29] *Id.*

[30] *Sherrod, supra* note 20.

[31] See, *Hall, supra* note 19; *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Reimers-Hild v. State*, 274 Neb. 438, 741 N.W.2d 155 (2007); *Lawry, supra* note 22; *Sherrod, supra* note 20; *D.M., supra* note 24.

In *Sherrod*, we held that subject matter jurisdiction is conferred by the general waiver of tort immunity found in § 81-8,215. We then cited four federal appellate decisions[32] and a state court decision[33] to hold that the government bears the burden to plead and prove the application of an exception to a waiver of sovereign immunity under a tort claims act.[34] But not all of the cited federal cases supported our holding that a sovereign immunity defense can be waived by failing to plead it, and the differences are important.

We primarily relied on the Seventh Circuit's holding in *Stewart v. United States*[35] that the Federal Tort Claims Act (FTCA) "conferred general jurisdiction of the subject matter of claims coming within its purview, and the exceptions referred to are available to the government as a defense only when aptly pleaded and proven." The court "thus viewed the discretionary function exception as a waivable affirmative defense rather than an impairment of its power to adjudicate."[36]

We also cited the Sixth Circuit's holding in *Carlyle v. United States, Dept. of the Army*[37] that a plaintiff can invoke jurisdiction only if the complaint is facially outside the exceptions of the FTCA. The court further stated that "[o]nly after a plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by [the FTCA] does the burden fall on the government to prove the applicability

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[32] See *Stewart v. United States*, 199 F.2d 517 (7th Cir. 1952). See, also, *Autery v. U.S.*, 992 F.2d 1523 (11th Cir. 1993); *Prescott v. U.S.*, 973 F.2d 696 (9th Cir. 1992); *Carlyle v. United States, Dept. of the Army*, 674 F.2d 554 (6th Cir. 1982).

[33] See *State v. Zimring*, 52 Haw. 477, 479 P.2d 205 (1970).

[34] *Sherrod, supra* note 20.

[35] *Stewart, supra* note 32, 199 F.2d at 519.

[36] *Richardson v. United States*, 943 F.2d 1107, 1113 (9th Cir. 1991).

[37] *Carlyle, supra* note 32.

of a specific provision of [the FTCA]."[38] And we cited a Ninth Circuit case, *Prescott v. U.S.*,[39] in which the court agreed with the Sixth Circuit's decision in *Carlyle*.

In addition to these three federal court cases that we cited in *Sherrod*, the Third Circuit also holds that a defendant in an action brought under the FTCA bears the burden to prove an exception to the government's waiver of immunity.[40]

But holding that the government bears the ultimate burden of proof is not the same as holding that the State's sovereign immunity can be waived by a state attorney's failure to raise it as a defense. And even among federal circuit courts that have decided the burden of proof question, they do not all agree that the FTCA exceptions are affirmative defenses for which the defendant bears the burden of persuasion.[41] Their disparity may stem from the U.S. Supreme Court's discussions of the jurisdictional nature of sovereign immunity.

The Supreme Court has clarified that a State's 11th Amendment immunity from suit is a convenient shorthand, but something of a misnomer, for state sovereign immunity, which is broader than the terms of the 11th Amendment.[42] Under the 11th Amendment, an unconsenting State is immune from federal court suits brought by its own citizens, as well as by citizens of another State.[43] The Supreme Court has held

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[38] *Id.* at 556.

[39] *Prescott, supra* note 32.

[40] See *S.R.P. ex rel. Abunabba v. U.S.*, 676 F.3d 329 (3d Cir. 2012).

[41] See, *Wood v. U.S.*, 845 F.3d 123 (4th Cir. 2017); *Tsolmon v. U.S.*, 841 F.3d 378 (5th Cir. 2016); *Carroll v. U.S.*, 661 F.3d 87 (1st Cir. 2011); *Garcia v. U.S. Air Force*, 533 F.3d 1170 (10th Cir. 2008); *OSI, Inc. v. U.S.*, 285 F.3d 947 (11th Cir. 2002).

[42] *Northern Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 126 S. Ct. 1689, 164 L. Ed. 2d 367 (2006).

[43] *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

that states can waive their 11th Amendment immunity in federal court and that federal courts can ignore an immunity defense if a State has not raised it.[44] It has explained that a State can waive its 11th Amendment immunity, because the amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction."[45] And it has refused to hold that the FTCA exceptions are subject to the general rule that a waiver of sovereign immunity will be strictly construed in favor of the sovereign.[46] It has reasoned that in the context of the FTCA, "'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' . . . which 'waives the Government's immunity from suit in sweeping language.'"[47]

But the Supreme Court has also held that "[s]overeign immunity is by nature jurisdictional, . . . and the terms of the United States' '"consent to be sued in any court define that court's jurisdiction to entertain the suit."'"[48] In an FTCA appeal, it concluded that because the United States "can be sued only to the extent that it has waived its immunity, due regard must be given to the exceptions . . . to such waiver."[49]

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[44] See, *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998); *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).

[45] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).

[46] *Dolan v. Postal Service*, 546 U.S. 481, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006).

[47] *Id.*, 546 U.S. at 492.

[48] *Henderson v. United States*, 517 U.S. 654, 675-76, 116 S. Ct. 1638, 134 L. Ed. 2d 880 (1996). Accord *FDIC v. Meyer*, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

[49] *United States v. Orleans*, 425 U.S. 807, 814, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976).

Additionally, in *United States v. Gaubert*,[50] the Supreme Court imposed a pleading standard that requires a plaintiff's factual allegations to support a finding that the FTCA's discretionary function exception does not apply when a presumption of discretionary conduct exists:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.[51]

Finally, the Supreme Court has held that a State's 11th Amendment immunity defense "sufficiently partakes of the nature of a jurisdictional bar" that it can be raised for the first time on appeal,[52] although it has discretion to determine that a State has waived that argument by failing to raise it on appeal.[53]

Not all federal circuit courts have weighed in on which party bears the ultimate burden of persuasion on the application of an FTCA exception.[54] Our analysis in *Sherrod* failed to recognize this. Specifically, our quote from *Autery v. U.S.*,[55] an 11th Circuit case that we cited, seemed to place that court in agreement with courts that hold the government bears the burden

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[50] *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

[51] *Id.*, 499 U.S. at 324-25.

[52] *Edelman, supra* note 43, 415 U.S. at 678.

[53] See, *Patsy, supra* note 44; *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975).

[54] See, e.g., *Gibson v. U.S.*, 809 F.3d 807 (5th Cir. 2016); *Hart v. U.S.*, 630 F.3d 1085 (8th Cir. 2011).

[55] *Autery, supra* note 32.

to prove an exception.[56] But the 11th Circuit explicitly declined to decide the burden of proof question.[57] To the contrary, the court noted that the Supreme Court's decision in *Gaubert* appears to put the burden on the plaintiff to disprove the discretionary function exception.[58] The 10th Circuit has similarly noted that *Gaubert* casts doubt on the 9th Circuit's holding in *Prescott*—which we cited in *Sherrod*—that the government bears the ultimate burden of persuasion.[59] And the Sixth Circuit found it unnecessary to decide whether *Gaubert* affected its 1982 holding in *Carlyle*[60]—which we also cited in *Sherrod*—that the government bore the burden to prove an FTCA exception applied if a plaintiff's complaint was "'facially outside the exceptions of [28 U.S.C.] § 2680.'"[61]

Although the U.S. Supreme Court has not decided the ultimate burden of proof question for the FTCA exceptions, most federal circuit courts have held that the plaintiff bears the burden of alleging facts that show the exceptions to the government's waiver of immunity under the FTCA do not deprive the court of subject matter jurisdiction.[62] That includes the Sixth and Ninth Circuit decisions that we cited in *Sherrod*.[63]

In fact, in the Ninth Circuit case we relied on, the court made the following statement in a footnote: "It is, of course,

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[56] See *Sherrod, supra* note 20.

[57] See *Autery, supra* note 32. Accord *Mesa v. U.S.*, 123 F.3d 1435 (11th Cir. 1997).

[58] See *id.*

[59] See *Kiehn v. U.S.*, 984 F.2d 1100 (10th Cir. 1993).

[60] *Carlyle, supra* note 32.

[61] See *Sharp ex rel. Estate of Sharp v. U.S.*, 401 F.3d 440, 443 n.1 (6th Cir. 2005).

[62] See, e.g., *Edison v. U.S.*, 822 F.3d 510 (9th Cir. 2016); *Gibson, supra* note 54; *Zelaya v. U.S.*, 781 F.3d 1315 (11th Cir. 2015); *Molchatsky v. U.S.*, 713 F.3d 159 (2d Cir. 2013); *Welch v. U.S.*, 409 F.3d 646 (4th Cir. 2005); *Carlyle, supra* note 32.

[63] See, *Prescott, supra* note 32; *Carlyle, supra* note 32.

'well-established law that . . . jurisdictional defenses cannot be waived by the parties and may be raised for the first time on appeal or even raised by a court sua sponte.'"[64] In a previous case, it had remanded the matter for the district court to determine whether the discretionary function applied even though the government had not raised the exception: "[I]f the discretionary function applies, the claims should be dismissed for lack of jurisdiction. This court must consider jurisdiction even if the parties have not challenged it."[65] Other federal circuit courts agree that an FTCA exception can be considered for the first time on appeal, at least where the parties do not dispute facts relevant to the application of an exception.[66]

Similarly, the Eighth Circuit has held that because a court lacks subject matter jurisdiction if an alleged act falls within the discretionary function exception, a district court does not err in sua sponte ruling that it lacks jurisdiction and dismissing the plaintiff's action, where the jurisdictional facts are undisputed and the exception clearly applies.[67]

That leaves the Seventh Circuit's holding in *Stewart v. United States*[68] as the primary authority for our holding in *Sherrod* that the State's waiver of immunity can be forfeited if the State fails to plead and prove an STCA exception. *Stewart* remains good law in the Seventh Circuit,[69] and, as noted, the Third Circuit agrees.[70] But in a 2016 unpublished decision, the Third Circuit held that a federal district court did not err

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[64] *Prescott, supra* note 32, 973 F.2d at 701 n.2, citing *Roberts v. U.S.*, 887 F.2d 899 (9th Cir. 1989).

[65] *Roberts, supra* note 64, 887 F.2d at 900.

[66] See, *Garling v. U.S. E.P.A.*, 849 F.3d 1289 (10th Cir. 2017); *Medina v. U.S.*, 259 F.3d 220 (4th Cir. 2001); *Hydrogen Technology Corp. v. U.S.*, 831 F.2d 1155 (1st Cir. 1987).

[67] See *Hart, supra* note 54.

[68] *Stewart, supra* note 32.

[69] See, e.g., *Keller v. U.S.*, 771 F.3d 1021 (7th Cir. 2014).

[70] See *S.R.P. ex rel. Abunabba, supra* note 40.

in sua sponte ruling that the plaintiff's claim was barred by the discretionary function exception.[71] It stated that although the exception is analogous to an affirmative defense, it is also jurisdictional on its face, which is a question that a court has an obligation to address.[72] Similarly, in a 1995 decision, the Seventh Circuit did not treat *Stewart* as binding precedent and independently decided on appeal that the relevant statutes and regulations showed the discretionary function exception barred the plaintiff's claim.[73]

These cases illustrate that because sovereign immunity is jurisdictional in nature, and because courts have a duty to determine whether they have subject matter jurisdiction over a matter, treating the FTCA exceptions as waivable affirmative defenses places courts in an impossible position when a jurisdictional problem appears on the face of a plaintiff's complaint.

[12-15] This court has repeatedly held that an appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.[74] And when a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim.[75] We have held that a trial court lacks subject matter jurisdiction over an action against the State unless the State has consented to suit.[76]

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[71] See *Bedell v. United States*, 669 Fed. Appx. 620 (3d Cir. 2016).

[72] *Id.*

[73] See *Rothrock v. U.S.*, 62 F.3d 196 (7th Cir. 1995).

[74] E.g., *J.S. v. Grand Island Public Schools, ante* p. 347, 899 N.W.2d 893 (2017).

[75] E.g., *Landrum v. City of Omaha Planning Bd., ante* p. 165, 899 N.W.2d 598 (2017).

[76] See, *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013); *Engler v. State*, 283 Neb. 985, 814 N.W.2d 387 (2012); *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009); *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

And lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[77] As discussed, however, we have also held in several cases that the exceptions to the STCA and the Political Subdivisions Tort Claims Act are affirmative defenses that the State must plead and prove.[78]

We conclude that these lines of cases are irreconcilable to the extent that the latter cases imply that a state attorney can waive the State's immunity from suit by failing to raise an exception in a responsive pleading. But when a plaintiff's complaint shows on its face that a claim is barred by one of the exceptions, the State's inherent immunity from suit is a jurisdictional issue that an appellate court cannot ignore.

[16,17] The doctrine of stare decisis requires that we adhere to our previous decisions unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.[79] The doctrine is entitled to great weight, but it does not require us to blindly perpetuate a prior interpretation of the law if we conclude the prior interpretation was clearly incorrect.[80]

[18] We conclude that our cases holding that the State must plead and prove an exception to the STCA are clearly erroneous to the extent they can be read to hold that a state attorney waives an immunity defense under § 81-8,219 by failing to raise it in a pleading or to a trial court. To the extent that they can be so interpreted, the cases cited in footnotes 28 and 31 are overruled. We hold that an exception to the State's waiver of immunity under the STCA is an issue that the State may raise for the first time on appeal and that a court may consider sua sponte.

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[77] E.g., *J.S., supra* note 74.

[78] See cases cited *supra* notes 28 and 31.

[79] See *Cano v. Walker, ante* p. 580, 901 N.W.2d 251 (2017).

[80] See *id.*

[19] This holding does not mean that the State may litigate factual disputes relevant to the application of an STCA exception for the first time on appeal. But an appellate court has the power to determine whether a plaintiff's allegations, taken as true, show that a tort claim is facially barred by an STCA exception under § 81-8,219. We turn to the allegations in Davis' complaint.

Davis alleged that he turned himself in to authorities after his parole officer directed him to do so because his parole eligibility date had been miscalculated. He alleged that he was reincarcerated for almost 2 months despite his protests that his parole eligibility date had been correctly calculated. We conclude that these allegations, accepted as true, are facially within the exception to the State's waiver of immunity for tort claims arising out of false imprisonment.[81]

[20] False imprisonment is the unlawful restraint of a person's liberty against his or her will.[82] Any intentional conduct that results in the placing of a person in a position where he or she cannot exercise his or her will in going where he or she may lawfully go may constitute false imprisonment.[83] The Court of Appeals has previously held that a plaintiff's claim that prison officials detained him past his correct release date stated a claim of false imprisonment.[84] We agree and conclude that the same reasoning applies here. Davis' allegations that the prison officials negligently calculated his parole eligibility date does not preclude the application of the false imprisonment exception. The heart of his claim is that he was unlawfully reincarcerated, and no further discovery could correct that fundamental defect in his complaint. His negligence claim

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[81] See § 81-8,219(4).

[82] *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

[83] *Id.*

[84] See *Cole v. Clarke*, 8 Neb. App. 614, 598 N.W.2d 768 (1999). See, also, Annot., 152 A.L.R. Fed. 605, § 5 (1999); 35A Am. Jur. 2d *Federal Tort Claims Act* § 91 (2010).

against the state defendants arose out of their alleged contribution to his unlawful imprisonment, their failure to correct the mistake, or their failure to ensure that such mistakes would not occur.

[21] As explained, under the STCA, if an officer or employee was acting within the scope of his or her office or employment and the alleged tortious conduct falls within an exception to the State's waiver of tort immunity, the STCA bars a tort claim against the officer or employee, regardless of the capacity in which he or she was purportedly sued. Because the State has not consented to suit for claims arising out of a false imprisonment, Davis has not alleged a tort claim that is plausible on its face against any named defendant. Although our reasoning necessarily differs from the district court's, we may affirm a lower court's ruling that reaches the correct result, albeit based on different reasoning.[85] The court did not err in dismissing Davis' tort claim. We turn to his § 1983 claims.

### 3. Validity of Davis' § 1983 Claims Against State Officers and Employees

Davis concedes that the court properly dismissed his § 1983 claims against the State, its agencies, and its employees in their official capacities. But he contends that the court erred in dismissing his § 1983 claims against the defendants in their individual capacities. Section 1983 provides, in relevant part, the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

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[85] E.g., *Phillips v. Liberty Mut. Ins. Co.*, 293 Neb. 123, 876 N.W.2d 361 (2016).

### (a) Sovereign Immunity Bars Davis' § 1983 Claims Against State, Arms of State, and State Defendants Sued in Their Official Capacities

[22,23] The U.S. Supreme Court has interpreted § 1983 to mean that "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes" are not "persons" that can be sued under the statute.[86] Whether a state entity is an arm of the State and entitled to share its 11th Amendment immunity is a question of federal law.[87]

[24,25] Under federal law, whether a money judgment against a state entity would be enforceable against the State is the critical consideration under § 1983 for determining whether the entity is an arm of the State and therefore immune from suit by private persons.[88] Accordingly, we have held that a suit against a state agency is a suit against the State and that both the State and state agencies can assert the State's sovereign immunity against suit.[89]

[26] The Department is a state agency. Structurally, the Parole Board is more an arm of the State than a state agency. It is not a political subdivision or a statutorily created agency. It is a constitutionally created body of state government that is part of the executive branch.[90] Because any judgment against the Parole Board would be a judgment against the State, it is cloaked with the State's 11th Amendment immunity and cannot be named as a defendant in an action brought under § 1983.

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[86] See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

[87] See *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997).

[88] See *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994). See, also, *Regents of Univ. of Cal., supra* note 87.

[89] See, e.g., *Anthony K. v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 540, 855 N.W.2d 788 (2014).

[90] *Adams v. State*, 293 Neb. 612, 879 N.W.2d 18 (2016).

[27,28] Similarly, the U.S. Supreme Court has interpreted § 1983 to mean that a state official sued in his or her official capacity is not a person who can be sued in an action brought under § 1983, unless the plaintiff seeks only prospective relief.[91] Prospective relief is permitted against state officials, because the doctrine of *Ex parte Young*[92] applies to § 1983 claims.[93] Under that doctrine, a State's 11th Amendment immunity does not bar a suit against state officers when the plaintiff seeks only prospective relief for ongoing violations of federal rights.[94] But when a plaintiff seeks money damages against a state officer or employee in his or her official capacity, the State is the real party in interest, because the officer's liability in that capacity is liability for the state entity that the officer represents.[95]

Davis is not seeking prospective relief from any ongoing official state act or policy. He is seeking money damages for past deprivations of constitutional rights. Accordingly, the court properly dismissed Davis' § 1983 claims against the State, the Parole Board, the Department, and all state defendants sued in their official capacities.

(b) Personal Capacity Claims Under § 1983

[29] Under 42 U.S.C. § 1983, the State's sovereign immunity does not bar a claim for damages against state officials and employees who are sued in their personal capacities.[96]

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[91] See *Will, supra* note 86. Accord *Wilkinson v. Dotson*, 544 U.S. 74, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005).

[92] *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

[93] See *Will, supra* note 86.

[94] See *Doe, supra* note 31, citing *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002).

[95] See *Anthony K., supra* note 89, citing *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

[96] See, *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Accord, e.g., *Suarez Corp. Industries v. McGraw*, 125 F.3d 222 (4th Cir. 1997).

Personal capacity claims "seek to impose individual liability upon a government officer for actions taken under color of state law."[97] The U.S. Supreme Court has clarified that an earlier reference it made to the capacity in which an officer or employee *acted* "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury."[98]

[30,31] "'[T]o establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.'"[99] Acting under the color of state law does not mean that a state official or employee must have been complying with state law. Under § 1983, liability exists as long as the action was taken within the scope of the defendant's official authority, even if the official or employee abused his or her authority.[100]

[32] But state defendants are entitled to assert personal common-law immunity defenses against a § 1983 action.[101] "While the plaintiff in a personal-capacity suit need not establish a connection to governmental 'policy or custom,' officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.'"[102]

The state defendants argue that they are entitled to two types of personal immunity defenses against Davis' § 1983 claims: absolute immunity and qualified immunity. Before discussing the defendants' immunity defenses, we consider the

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[97] *Hafer, supra* note 96, 502 U.S. at 25.

[98] *Id.*, 502 U.S. at 26.

[99] *Id.*, 502 U.S. at 25 (emphasis in original), citing *Graham, supra* note 95.

[100] *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), *overruled on other grounds, Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

[101] See *Filarsky v. Delia*, 566 U.S. 377, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012).

[102] *Hafer, supra* note 96, 502 U.S. at 25, quoting *Graham, supra* note 95.

validity of Davis' claims that the state defendants violated his due process and Eighth Amendment rights.

(c) Deliberate Indifference to a Plaintiff's Unlawful Incarceration States Substantive Due Process or Eighth Amendment Violation

[33] Under the Due Process Clause of the federal Constitution, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[103] The Due Process Clause provides both procedural and substantive protections.[104]

[34] In *Morrissey v. Brewer*,[105] the U.S. Supreme Court held that parolees have a valuable liberty interest in their continued parole even though it depends upon their compliance with parole conditions. Parole is therefore protected by the 14th Amendment and requires at least minimal procedural protections before a State can terminate it.[106]

But Davis has raised a substantive due process argument. He claims that the state defendants were deliberately indifferent to his repeated claim, before and after his reincarceration, that because the mandatory minimum sentence did not apply to him, he had been properly released on parole. Relatedly, he argues that the defendants violated his Eighth Amendment right to be free from incarceration without a penological justification.

Federal courts have addressed both substantive due process claims and Eighth Amendment claims resting on a plaintiff's unlawful detention or incarceration. Regardless of the asserted right, these cases require a plaintiff to show the same level

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[103] U.S. Const. amend. XIV, § 1.

[104] See, e.g., *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 293, 739 N.W.2d 742, 756 (2007), citing *Harrah Independent School Dist. v. Martin*, 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979).

[105] *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

[106] *Id.*

of culpability for a State's failure to investigate the plaintiff's claim that he or she was being unlawfully held: deliberate indifference.

[35-38] The "'touchstone of due process is protection of the individual against arbitrary action of government,' . . . whether the fault lies in a denial of fundamental procedural fairness . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective."[107] The "due process protection in the substantive sense limits what the government may do in both its legislative . . . and its executive capacities."[108] But the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."[109] "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[110] "[T]he substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'"[111] "[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."[112]

The U.S. Supreme Court applied these principles in *Baker v. McCollan*,[113] a case from the Fifth Circuit involving the respondent's mistaken arrest on a warrant and a sheriff's office's unlawful detention of him for 3 days, despite information at the office that would have revealed the mistake. The

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[107] *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

[108] *Id.*, 523 U.S. at 846.

[109] *Id.*

[110] *Id.*

[111] *Id.*, 523 U.S. at 847.

[112] *Id.*, 523 U.S. at 849.

[113] See *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

sheriff verified the respondent's claim as soon as he learned about it and released him.[114] The Fifth Circuit held that the sheriff had a "duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or a similar name."[115] It concluded that a jury could find the sheriff was not entitled to qualified immunity because he had caused the respondent's detention by unreasonably failing to have adequate identification procedures in place.

The Supreme Court reversed. It concluded that the Fifth Circuit erred in applying tort principles to conclude that the sheriff had violated the respondent's constitutional right to be free of a liberty deprivation without due process of law. The Court acknowledged that at some point, an unlawful detention would cause a constitutional deprivation:

> Obviously, one in the respondent's position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment. . . . We may even assume, *arguendo*, that, depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of "liberty . . . without due process of law."[116]

But the Court concluded that a 3-day detention could not show a constitutional deprivation. "[F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official."[117]

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[114] *Id.*

[115] *McCollan v. Tate*, 575 F.2d 509, 513 (5th Cir. 1978), *reversed, Baker, supra* note 113.

[116] *Baker, supra* note 113, 443 U.S. at 144-45.

[117] *Id.*, 443 U.S. at 146.

[39] In *Baker*, the Court had no need to determine the applicable culpability standard for a valid unconstitutional detention claim, because it concluded that the respondent had failed to show a constitutional deprivation. But normally, when a State holds an individual in custody, the requisite level of conscience-shocking conduct is deliberate indifference, subject to the caveat that the standard is "sensibly employed only when actual deliberation is practical."[118]

It is true that courts usually apply the deliberate indifference standard of culpability when a State has failed to provide for an inmate's basic needs.[119] But federal courts of appeals have applied the deliberate indifference standard to substantive due process claims involving wrongful detentions.[120] "When 'actual deliberation is practical,' establishing a substantive-due-process violation requires proof of deliberate indifference . . . ."[121] Some federal courts have explicitly distinguished *Baker*, concluding that the short duration of that detention was crucial to the decision and that *Baker* did not preclude liability under § 1983 for all false imprisonment claims.[122]

But in cases involving both an unlawful pretrial detention and an overdetention of an inmate, federal courts have held that state officials who are deliberately indifferent to an individual's claim that he or she is being unlawfully detained violate the individual's substantive due process right to be free from wrongful incarceration without due process of law.[123]

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[118] See *County of Sacramento, supra* note 107, 523 U.S. at 851.

[119] See *id.*

[120] See, e.g., *Davis v. Hall*, 375 F.3d 703 (8th Cir. 2004); *Cannon v. Macon County*, 1 F.3d 1558 (11th Cir. 1993), *modified on denial of rehearing* 15 F.3d 1022 (11th Cir. 1994).

[121] See *Scott v. Baldwin*, 720 F.3d 1034, 1036 (8th Cir. 2013).

[122] See, e.g., *Davis, supra* note 120, *Cannon, supra* note 120; *Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992); *Haygood v. Younger*, 769 F.2d 1359 (9th Cir. 1985).

[123] See, *Davis, supra* note 120 (citing cases); *Cannon, supra* note 120.

Similarly, federal courts have held that detaining an inmate after the expiration of his or her sentence without penological justification is an Eighth Amendment violation when prison officials are deliberately indifferent to the inmate's liberty interest.[124] These parallel lines of cases exist because the U.S. Supreme Court has held that conditions of pretrial detention are analyzed under the Due Process Clause, while conditions of incarceration after a conviction are analyzed under the Eighth Amendment.[125] But the culpability standard is the same.

Finally, in an action under *Bivens v. Six Unknown Fed. Narcotics Agents*[126] "(the § 1983 counterpart for actions against federal officials),"[127] the Ninth Circuit held that federal prison officials who were deliberately indifferent to an inmate's claim that they had miscalculated his release date were not entitled to qualified immunity.[128] The court reasoned that the officials had violated a clear duty to investigate his claim under federal regulations and policies when he raised a substantial question regarding the accuracy of the agency calculation on which the officials had relied in ignoring his protests.

In sum, whether a plaintiff's § 1983 claim rests on an alleged violation of the 8th or 14th Amendment or a government official's violation of a clear regulatory duty intended to protect those rights, federal courts have expressly or implicitly premised liability on a finding that the government officials were

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[124] See, *Burke v. Johnston*, 452 F.3d 665 (7th Cir. 2006); *Moore v. Tartler*, 986 F.2d 682 (3d Cir. 1993); *Haygood, supra* note 122.

[125] See, *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Wharton v. Danberg*, 854 F.3d 234 (3d Cir. 2017).

[126] See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

[127] *Powers v. Hamilton Cty. Pub. Def. Comm.*, 501 F.3d 592, 610 (6th Cir. 2007).

[128] *Alexander v. Perrill*, 916 F.2d 1392 (9th Cir. 1990). See, also, *Burke, supra* note 124.

deliberately indifferent in failing to investigate the plaintiff's claim that his sentence was miscalculated.[129] Deliberate indifference represents the consensus of federal appellate courts on the type of government overdetention or false imprisonment that will result in a constitutional deprivation.

[40] We therefore hold that a plaintiff states a cognizable constitutional violation under the 8th or 14th Amendment when the plaintiff alleges that a state defendant—who had knowledge of the plaintiff's complaint that he or she was being unlawfully detained and the authority to investigate that complaint—was deliberately indifferent to the plaintiff's liberty interest and the defendant's failure to take action resulted in the plaintiff's continued unlawful detention for more than an insignificant period.

Davis alleged the state defendants were deliberately indifferent to his protests that they had miscalculated his parole eligibility date and alleged he was reincarcerated for more than an insignificant amount of time. So we turn to the reasons that the district court dismissed his claims.

### (d) Court Properly Dismissed Davis' § 1983 Claim Against Parole Board and Its Past and Current Members

[41] The court implicitly concluded that the Parole Board and its members had absolute immunity from Davis' claims by ruling that its members were performing a quasi-judicial function. Public officials performing a quasi-judicial function have absolute immunity from damages for acts they commit within the scope of that function.[130] A quasi-judicial function refers to one that is closely related to the judicial process.[131]

[42] In determining whether to grant quasi-judicial immunity, courts examine the nature of the functions with which

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[129] See, *Burke, supra* note 124; *Davis, supra* note 120, *Moore, supra* note 124; *Alexander, supra* note 128.

[130] See *Frey v. Blanket Corp.*, 255 Neb. 100, 582 N.W.2d 336 (1998).

[131] See *Noffsinger, supra* note 26.

a particular official or class of officials has been lawfully entrusted to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.[132]

> [W]here an officer is invested with discretion and is empowered to exercise his or her judgment in matters brought before the officer, he or she is sometimes called a quasi-judicial officer and when so acting, is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority and without willfulness, malice, or corruption. . . . However, quasi-judicial immunity from any suit or damages based upon the performance of duties within a person's authority attaches not to particular offices, but to particular official functions.[133]

We have previously recognized that the Parole Board exercises independent discretion in deciding whether to grant parole to a convicted offender.[134] In addition, federal appellate courts hold that parole boards have absolute immunity from suit when they perform quasi-judicial functions such as granting, denying, or revoking parole.[135]

But Davis contends that the Parole Board was not exercising discretion in revoking his parole, because it was not reviewing his conduct while on parole. He argues that the revocation hearing dealt only with the calculation of his parole eligibility, which is a ministerial function to which quasi-judicial immunity does not attach. Davis argues that instead of exercising discretion, the Board blindly followed the Department's lead

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[132] *Id.*

[133] *Id.* at 188-89, 622 N.W.2d at 624.

[134] See *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997).

[135] See, *Swift v. California*, 384 F.3d 1184 (9th Cir. 2004); *Montero v. Travis*, 171 F.3d 757 (2d Cir. 1999); *Wilson v. Kelkhoff*, 86 F.3d 1438 (7th Cir. 1996); *Sultenfuss v. Snow*, 894 F.2d 1277 (11th Cir. 1990).

in incorrectly applying a mandatory minimum sentencing statute to revoke his parole.

At oral arguments, Davis relied on our decision in *Pratt v. Nebraska Bd. of Parole*.[136] He argued that it showed the Parole Board was not entitled to immunity here, because it was not exercising discretion. In *Pratt*, we considered an earlier version of § 83-1,110, which set out the calculation requirements for determining an offender's parole eligibility date. We held that the finding of parole eligibility is a ministerial duty that can be enforced through a writ of mandamus. When we decided *Pratt*, a recommendation of parole from an inmate's sentencing judge was a circumstance that required the Parole Board to consider the inmate for parole, and such a letter had been presented to the Parole Board. We stated that unlike the decision whether to grant parole,

> a finding of eligibility for parole was not discretionary. Rather, it was the duty of the Board to recognize the offender's parole eligibility upon a showing of certain facts, regardless of the Board's own judgment or opinion concerning the propriety or impropriety of such a determination. Therefore, the Board's duty to recognize [the prisoner's] parole eligibility was ministerial. The Board did not have to grant [him] parole, but it had the duty to consider him for parole.[137]

[43] But this case is distinguishable from *Pratt*, because the Parole Board was not refusing to exercise its discretion to grant a parole. It was exercising its discretion to revoke a parole in reliance on information provided to it from the Department. Nebraska's statutes require the Department to provide the Parole Board with its calculations,[138] and the Parole Board is entitled to rely on them. Davis points to no statute or

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[136] *Pratt, supra* note 134.

[137] *Id.* at 911, 567 N.W.2d at 188.

[138] See Neb. Rev. Stat. §§ 83-1,107 (Cum. Supp. 2016) and 83-1,109 (Reissue 2014).

regulation that requires the Parole Board to perform its own calculations or investigations. Its mere reliance on evidence presented to it does not change the nature of its function of exercising independent discretion whether to grant, deny, or revoke parole. Accordingly, the district that did not err in dismissing Davis' § 1983 claims against the Parole Board's past or current members.

### (e) Department's Employees Are Entitled to Qualified Immunity From Davis' § 1983 Claims

The court ruled that the state defendants who were not members of the Parole Board were entitled to qualified immunity from his due process and Eighth Amendment claims or that Davis had not alleged their personal participation in an alleged constitutional violation with sufficient specificity.

#### *(i) General Principles of Qualified Immunity*

[44,45] Most executive officials and employees are limited to asserting qualified immunity as an affirmative defense against a personal capacity claim under § 1983.[139] Qualified immunity shields state officials from money damages unless a plaintiff alleges facts that would, if proved, show (1) the official violated a federally guaranteed right and (2) the constitutional or statutory right was clearly established at the time of the challenged conduct.[140] A court can address the two components of the qualified immunity analysis in either order.[141]

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[139] See *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

[140] See, *Filarsky, supra* note 101; *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011); *Elder v. Holloway*, 510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994). Accord, e.g., *Potter v. Board of Regents*, 287 Neb. 732, 844 N.W.2d 741 (2014); *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010).

[141] *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009); *Potter, supra* note 140.

[46,47] Because qualified immunity is immunity from suit, a trial court should try to resolve "'immunity questions at the earliest possible stage in litigation.'"[142] "'[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken.'"[143]

[48] Whether a federal right is clearly established presents a question of law.[144] A court must consider whether the law is clearly established as it relates to the particular facts of a case:

> "[C]learly established law" should not be defined "at a high level of generality." . . . As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. . . . Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[145]

The unlawfulness of a defendant's conduct must be obvious or apparent in the light of preexisting law.[146] That is, the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right.[147]

[49,50] To show a clearly established federal right, the U.S. Supreme Court does "'not require a case [to be] directly on

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[142] *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled in part on other grounds, Pearson, supra* note 141.

[143] *Messerschmidt v. Millender*, 565 U.S. 535, 546, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012), quoting *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

[144] *Elder, supra* note 140.

[145] *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (citations omitted).

[146] *Id.*

[147] See, e.g., *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014).

point, but existing precedent must have placed the statutory or constitutional question beyond debate.'"[148] Additionally, both the Supreme Court and federal circuit courts have stated that a federal right can be established by a robust consensus of cases of persuasive authority.[149]

[51] Showing that a state defendant was negligent is insufficient to defeat a qualified immunity defense.[150] "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law."[151]

*(ii) Application of Qualified Immunity Principles to Department Employees*

Davis alleged that he continually told Department employees verbally and through letters that his parole eligibility date had been correctly calculated and that the mandatory minimum sentence did not apply to him. The court essentially concluded that there was no clearly established right to have an error-free parole revocation and that the defendants' mistaken belief that Davis' parole eligibility date was incorrect did not strip them of qualified immunity.

We agree that Davis had no right to an error-free proceeding. However, the qualified immunity issues were whether the defendants were deliberately indifferent to Davis' oral and written protests—before and after they reincarcerated him—that

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[148] *Taylor v. Barkes*, 575 U.S. 822, 825, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015).

[149] See, e.g., *Ashcroft, supra* note 140; *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); *Booker v. South Carolina Dept. of Corrections*, 855 F.3d 533 (4th Cir. 2017); *De La Rosa v. White*, 852 F.3d 740 (8th Cir. 2017); *Mammaro v. N.J. Div. of Child Prot. and Permanency*, 814 F.3d 164 (3d Cir. 2016).

[150] See, *Potter, supra* note 140; *Ashby, supra* note 140.

[151] *Potter, supra* note 140, 287 Neb. at 740, 844 N.W.2d at 750, citing *Messerschmidt, supra* note 143.

they had calculated his parole eligibility date incorrectly, and whether a reasonable Department official or employee should have known that the time the Department took to correct the calculation of Davis' parole eligibility date was unlawful in light of the clearly established law.

The court could not know whether the Department employees were deliberately indifferent to Davis' protests or which employees or officials would have seen his letters protesting his reincarceration. The State did not file a responsive pleading. It is true that the Department's second release of Davis 2 months later is some indication that its employees investigated his complaint. But giving Davis the benefit of all reasonable inferences, his allegations could equally suggest that for a significant period of this time, the Department's employees did nothing to investigate. This is a reasonable inference because the computation did not involve complex facts or laws.

But we do not believe that at the time of Davis' reincarceration, the law clearly established that the Department employees would violate a federal right by failing to promptly respond to Davis' claim that they had miscalculated his parole eligibility date. Both the Eighth Circuit and the Seventh Circuit have held that under both the 8th and 14th Amendments, inmates have a clearly established right to be free from wrongful, prolonged incarceration.[152] And we conclude that extending this rule to wrongful recommitments based on a miscalculated parole eligibility date is required by the U.S. Supreme Court's holding in *Morrissey* that parolees have a valuable liberty interest in their continued parole.[153]

But the typical miscalculation case involves a State's wrongful incarceration of an inmate beyond his or her release date. Davis has not pointed to a case in which a court has held that a State has or can violate an offender's 14th Amendment

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[152] See, *Figgs v. Dawson*, 829 F.3d 895 (7th Cir. 2016); *Scott, supra* note 121.

[153] See *Morrissey, supra* note 105.

rights by being deliberately indifferent to the parolee's claim that he or she has been wrongly reincarcerated. Our research has uncovered only one somewhat comparable federal appellate decision dealing with a parolee's delayed release from parole.[154] Moreover, in *Morrissey*, the Court held that a lapse of 2 months before a parolee receives a revocation hearing for an alleged parole violation is not unreasonable.[155]

Given this precedent and the paucity of persuasive case law dealing with a State's deliberate indifference to a parolee's claim of a mistaken revocation, the Department's officials and employees did not violate a clearly established right to a prompt investigation of Davis' complaint.

### (f) Court Properly Dismissed Davis' § 1983 Claim Against State Defendants With No Responsibility for Parole Eligibility Calculations

[52] Vicarious liability is unavailable in a § 1983 action: "[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[156] But even if Davis could show that the state defendants had knowledge of his complaints and were deliberately indifferent to them, he could not show that they should have known they would violate a clearly established right by doing so. The court therefore did not err in dismissing his § 1983 claims against all the defendants.

Because we conclude that the state defendants were entitled to qualified immunity against Davis' § 1983 claims against the defendants, we do not reach his assignment that the court erred in determining that he had failed to plead his § 1983 claims with sufficient specificity.

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[154] See *Hankins v. Lowe*, 786 F.3d 603 (7th Cir. 2015).

[155] See *Morrissey, supra* note 105.

[156] *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

### 4. Davis' Opportunity to Amend

Finally, Davis argues that he asked the court for leave to amend during the hearing and that the court erred in dismissing his complaint without giving him that opportunity. Under § 6-1115(a), a "party may amend [its] pleading once as a matter of course before a responsive pleading is served."

The district court did not specify whether it was dismissing Davis' complaint with prejudice, but we agree that this was the court's intent. Nevertheless, there is no need to separately consider the appropriateness of that dismissal. Our review of Davis' appeal has subsumed his argument that the court erred in dismissing his complaint without an opportunity to amend. And that review has led us to the conclusion that an amendment would not cure the defects in Davis' complaint.

## VI. CONCLUSION

Regarding Davis' negligence claim, we conclude that the claim rests on allegations that the state defendants unlawfully reincarcerated him because they miscalculated his parole eligibility date. As such, his claim is one arising out of false imprisonment, which is a claim barred by sovereign immunity, because it is specifically excepted from the State's waiver of immunity under the STCA. Although the defendants did not raise this exception to the district court, we conclude that an STCA exception can be raised for the first time on appeal and considered by a court sua sponte.

Regarding Davis' § 1983 claims, the court did not err in dismissing his claims against the Parole Board, because its members were entitled to absolute quasi-judicial immunity from suit and the Parole Board itself is an arm of the State that cannot be sued in a § 1983 action. The court also did not err in dismissing Davis' § 1983 claims against the remaining state defendants, because he cannot show that they violated a clearly established right to a prompt investigation of Davis' complaint that he was wrongly reincarcerated.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Frenchman-Cambridge Irrigation District, by its Board of Directors, a Nebraska political subdivision, appellant and cross-appellee, v. Nebraska Department of Natural Resources et al., appellees and cross-appellants.

902 N.W.2d 159

Filed October 6, 2017. No. S-16-1121.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Jurisdiction: Appeal and Error.** Before proceeding to the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
5. **Standing: Proof.** To have standing, a litigant first must clearly demonstrate that it has suffered an injury in fact. That injury must be concrete in both a qualitative and temporal sense.
6. **Complaints: Justiciable Issues.** A complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.

Appeal from the District Court for Furnas County: James E. Doyle IV, Judge. Vacated and dismissed.

David A. Domina and Christian T. Williams, of Domina Law Group, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, Justin D. Lavene, Joshua E. Dethlefsen, and Kathleen A. Miller for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Kelch, J.

## NATURE OF CASE

Frenchman-Cambridge Irrigation District (FCID) appeals the district court's order dismissing its petition under Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim upon which relief can be granted. Before determining whether the district court's dismissal of the petition was proper, this court must determine whether FCID has standing to challenge the integrated management plans at issue and whether the court has subject matter jurisdiction pursuant to Neb. Rev. Stat. § 46-750 (Reissue 2010) or Neb. Rev. Stat. § 84-911(1) (Reissue 2014).

## BACKGROUND

FCID is a political subdivision created pursuant to the irrigation districts statutes,[1] under which FCID is authorized to enter into contracts to supply water for irrigation purposes with any person and with certain organizations within its district.[2] According to its petition, FCID uses the revenue from its sale of water to fulfill contractual obligations to the U.S. Department of the Interior and the U.S. Bureau of Reclamation.

FCID is located within the Republican River Basin. The portion of the basin located in Nebraska is divided into three

[1] See Neb. Rev. Stat. § 46-101 et seq. (Reissue 2010 & Cum. Supp. 2016).

[2] § 46-1,143.

natural resources districts: the Upper Republican Natural Resources District, the Middle Republican Natural Resources District, and the Lower Republican Natural Resources District. Each natural resources district (NRD), along with the other NRD's in Nebraska, was created by statute[3] to develop and conserve the state's natural resources, including its ground water and surface water.[4]

In 2004, portions of the Republican River Basin were declared "fully appropriated."[5] When a river basin is determined to be fully appropriated, Neb. Rev. Stat. § 46-715 (Cum. Supp. 2016) of the Nebraska Ground Water Management and Protection Act provides that the NRD's encompassing the basin and the Department of Natural Resources (Department) shall jointly develop an integrated management plan (IMP) to achieve and sustain a balance between water uses and water supplies for the long term.

In December 2015, the Republican River Basin NRD's adopted, and the Department approved, IMP's that provided for a 20-percent reduction in ground water pumping in the Republican River Basin area. Before these IMP's were adopted and approved, previous IMP's provided for a 25-percent reduction in ground water pumping. Thus, the new IMP's allow for 5 percent more ground water pumping than the previous ones.[6]

In January 2016, FCID filed a petition for review under the Administrative Procedure Act,[7] challenging the newly approved IMP's on constitutional and other grounds. In the petition, FCID alleges that the IMP's violate the U.S.

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[3] Neb. Rev. Stat. § 2-3203 (Reissue 2012).

[4] Neb. Rev. Stat. § 2-3229 (Reissue 2012).

[5] *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 281 Neb. 992, 996, 801 N.W.2d 253, 257 (2011).

[6] See *Kansas v. Nebraska*, 574 U.S. 445, 135 S. Ct. 1042, 191 L. Ed. 2d 1 (2015).

[7] See Neb. Rev. Stat. § 84-901 et seq. (Reissue 2014).

Constitution's Compact Clause,[8] Commerce Clause,[9] Equal Protection Clause,[10] and Due Process Clause,[11] as well as provisions of the Nebraska Constitution and the Republican River Compact. As defendants in the suit, FCID listed the Department, the director of the Department, the Republican River Basin NRD's, and the Attorney General.

In March 2016, the defendants filed a motion to dismiss pursuant to § 6-1112(b)(1) and (6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. A hearing on the matter was held on July 14.

On November 3, 2016, the district court issued an order granting the motion to dismiss. The district court found that there was subject matter jurisdiction, but dismissed the petition for failure to state a claim upon which relief could be granted.

From that order, FCID appeals and the defendants cross-appeal.

## ASSIGNMENTS OF ERROR

Although FCID agrees with the district court that it had subject matter jurisdiction, FCID assigns that "the basis on which it found jurisdiction was not completely correct." FCID also assigns, combined and restated, that the district court erred in finding that its petition failed to state a claim upon which relief could be granted and in failing to find that the IMP's were invalid on constitutional and statutory grounds.

The defendants cross-appeal and assign, combined and restated, that the district court erred in finding that FCID had standing, that the court had subject matter jurisdiction, and that the IMP's are "'rules and regulations.'"

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[8] U.S. Const. art. I, § 10, cl. 3.

[9] *Id.*, § 8, cl. 3.

[10] U.S. Const. amend. 14.

[11] *Id.*

## STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[12]

## ANALYSIS

[2,3] Before proceeding to the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[13] FCID claims that the district court, acting as an intermediate appellate court, erred when it considered and granted the defendants' motion to dismiss for lack of subject matter jurisdiction. However, lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[14]

[4] In this case, the State has raised two issues regarding subject matter jurisdiction: whether FCID has standing to challenge the IMP's[15] and whether the district court had subject matter jurisdiction under § 46-750 or § 84-911(1). Because we conclude that FCID lacks standing to challenge the IMP's, we do not reach the second issue. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[16]

[5,6] To have standing, a litigant first must clearly demonstrate that it has suffered an injury in fact.[17] That injury must

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[12] *Zapata v. McHugh*, 296 Neb. 216, 893 N.W.2d 720 (2017).

[13] *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

[14] *Davis v. Choctaw Constr.*, 280 Neb. 714, 789 N.W.2d 698 (2010).

[15] See *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 924, 830 N.W.2d 474, 478 (2013) ("[t]he defect of standing is a defect of subject matter jurisdiction").

[16] *Selma Development v. Great Western Bank*, 285 Neb. 37, 825 N.W.2d 215 (2013).

[17] *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

be concrete in both a qualitative and temporal sense.[18] A complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.[19]

FCID claims it has standing because the IMP's, which allow for increased ground water pumping, will deprive it of waters that would otherwise be available for its operations. In its petition for review, FCID alleges in part that increased ground water pumping will "interfere with stream recharge and flow . . . and [will] diminish surface waters otherwise subject to capture and diversion for use by FCID to fill its priority flow permits." FCID further alleges that the reduced streamflow will cause it to have to modify its budget and operations and to "attempt to negotiate for relief [for defaulting] from its obligations to [the Department of the Interior] and [the Bureau of Reclamation]."

We have previously considered the issue of standing in the water dispute case of *Central Neb. Pub. Power Dist. v. North Platte NRD*.[20] In that case, we held that an irrigation district did not adequately allege how its particular water use interest had been injured by an order of an NRD when it merely alleged that the order would cause a reduced water supply. In other words, the irrigation district failed to state how a reduced water supply would cause it harm. Here, however, FCID has additionally alleged that the reduced water supply would cause it to have to modify its budget and operations and to negotiate for relief for breaching its contracts. Thus, FCID argues that this case is distinguishable from *Central Neb. Pub. Power Dist.*, because its petition contains more specific allegations of harm than those in that case.

However, although FCID alleges more specific allegations of harm than those alleged in *Central Neb. Pub. Power*

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[18] *Id.*

[19] *Id.*

[20] *Id.*

*Dist.*, that additional alleged harm does not occur unless the IMP's actually decrease the water supply. And, as the defendants point out, the IMP's do not by themselves cause more ground water to be pumped. Instead, IMP's are simply jointly developed plans for how water will be managed.[21] Although the IMP's set forth the water controls that may be employed in times of water shortage, the IMP's themselves do not actually implement the controls. Instead, for those controls to be implemented, the NRD's must determine that such controls are necessary and issue subsequent orders pursuant to § 46-715 and Neb. Rev. Stat. §§ 46-718(2) and 46-739 (Reissue 2010).

This conclusion can be drawn not only from the three statutory sections above, but from the IMP's themselves. For example, within the IMP developed by the Department and the Middle Republican NRD, it states, "In accordance with *Neb. Rev. Stat*. § 46-715, one or more of the ground water controls authorized by *Neb. Rev. Stat*. § 46-739 and *Neb. Rev. Stat*. § 46-740 shall be adopted for the purpose of implementing this plan." In the IMP developed by the Department and the Upper Republican NRD, as well as the IMP developed by the Department and the Lower Republican NRD, it states that "[t]he [NRD] will utilize the ground water controls as provided by *Neb. Rev. Stat*. §§ 46-715, 46-739, and 46-740 to form the Ground Water Controls component of this IMP." Section 46-739 authorizes the NRD to issue the actual order that would limit the water usage by appropriators.

Before orders are issued pursuant to § 46-739, the IMP's contemplate that reviews of the water usage must be necessary. All of the IMP's at issue state that the "ground water depletions are maintained within their portion of Nebraska's Allowable Ground Water Depletions as computed through use of the Republican River Compact Administration Ground Water Model" and that "voluntary reductions in baseline

[21] See § 46-715.

pumping volumes will continue to be pursued by the [NRD] with the incentive of limiting the level of long-term management actions that are necessary during Compact Call Years." Finally, under the "Compliance Standards" section of each IMP, it states that "[o]n an annual basis the [Department] and [NRD] shall reexamine the sufficiency and effectiveness of the Compliance Standards to determine if amendments or modifications are necessary to ensure the State's compliance with the [Final Settlement Stipulation] and Compact." These examples reflect that the IMP's call for an annual review and that based upon the review, additional orders could be issued as needed. If and when such orders are issued, FCID would then have the right to seek judicial review depending upon the issue in question and the nature of the order.

Our conclusion that FCID has failed to show that the IMP's have caused an injury-in-fact is also supported by the Eighth Circuit's decision in *Sierra Club v. Robertson*.[22] That case involved a challenge to a land and resource management plan under the National Forest Management Act of 1976. In *Sierra Club*, the plaintiffs challenged the plan, alleging that the amount and method of timber harvesting permitted by the plan caused environmental or aesthetic harm, in violation of the National Forest Management Act of 1976 and the National Environmental Policy Act of 1969. But because the latter act required an additional stage of site-specific analysis before any timber could actually be cleared, the Eighth Circuit held that the asserted injury was not sufficiently imminent at the initial forest planning stage to create an injury in fact and that thus, the plaintiffs failed to establish standing.[23] Similarly, here, FCID's asserted injury is not sufficiently imminent because in order for the water controls set forth in the IMP's to be implemented, the NRD would have to determine that such controls were necessary and issue subsequent orders.

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[22] *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994).

[23] *Id.*

Accordingly, we conclude that FCID has failed to establish standing and that as a result, this court lacks jurisdiction.[24] Therefore, we dismiss the appeal.

Because we conclude that FCID lacks standing to challenge the IMP's, we need not reach the second jurisdictional question.[25]

## CONCLUSION

For the foregoing reasons, we conclude that FCID lacked standing to challenge the IMP's and that the district court lacked jurisdiction over the case. As a result, we also lack jurisdiction and dismiss the appeal and cross-appeal and hereby vacate the order of the district court for lack of jurisdiction.

Vacated and dismissed.

Stacy, J., not participating.

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[24] See *Landrum v. City of Omaha Planning Bd., ante* p. 165, 899 N.W.2d 598 (2017).

[25] See *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

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